163 U.S. 207

163-207

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 603.

E. M. BACON, E. G. GRAVES, AND C. C. GIBBS, TRUSTEE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED NOVEMBER 18, 1893.

(15,448.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 27, 1894.

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1 & 2 Assignment No. 8373, 3rd ass'm't.

Filed in court of civil appeals Oct. 4, 1892. W. L. Huff, clerk 2nd supreme judicial district.

In the Supreme Court of Texas.

E. M. BACON, E. G. GRAVES, and C. C. GIBBS, Appellants,
vs.
THE STATE OF TEXAS, Appellee. } No. 652.

Appealed from the district court of Mitchell county.

Transcript of the Record.

Applied for by T. D. Cobbs on the 23d day of January, A. D. 1892, and delivered to R. H. Looney on the 4th day of April, A. D. 1892.

J. E. HOOPER,
Clerk of the District Court of Mitchell County, Texas.

Filed 7th day of May, A. D. 1892.

CHAS. S. MORSE,
Clerk of the Supreme Court, Austin, Texas.

3 *Transcript.*

Caption.

THE STATE OF TEXAS, }
County of Mitchell. }

At a term of the district court begun and holden on the 23d day of Nov., A. D. 1891, at Colorado, within and for the county of Mitchell, before the Hon. Wm. H. Kennedy, and ending on the 2d day of January, A. D. 1892, the following case came on for trial, to wit:

THE STATE OF TEXAS, Plaintiff,
vs.
E. M. BACON, E. G. GRAVES, and C. C. GIBBS, Defendants. } No. 652.

4 *Plaintiff's First Amended Original Petition.*

In the District Court, November Term, 1891.

THE STATE OF TEXAS, }
Mitchell County. }

To Hon. William Kennedy, judge of said court:

The State of Texas, acting by and through C. A. Culberson, its attorney general, with leave of the court, comes and files this its first amended petition in lieu of its original petition filed herein on the — day of ——, 1891, and dismissing the case as to the Houston

& Texas Central Railway Company, complains of C. C. Gibbs and E. M. Bacon and E. G. Graves, and respectfully represents that the defendant Gibbs resides in Harris county, the defendant Graves resides in Bexar county, and the defendant Bacon resides in Travis county, all in the State of Texas.

That heretofore, to wit: on the 15th day of July, 1889, the plaintiff, The State of Texas, was the owner in fee-simple and in possession of the following tracts and parcels of land situated in the counties of Scurry, Borden, Fisher, Kent and Howard, in the State of Texas, namely: Beginning at the northeast corner of survey No. 170, block No. 25, Houston & Texas Central Railroad Company; thence west 13 miles; thence north 10 miles and 1,727 varas to the northeast corner of survey No. 1, block No. 29, township 5, North Texas & Pacific Railroad Company; thence north 77 degrees east with the north line of the Texas & Pacific 80 miles reservation 28 miles; thence east 7 miles; thence south 3 miles to the southwest corner of survey No. 59, block K, T. A. Thomson; thence east 5 miles to the southeast corner of survey No. 55, block K; thence south 2,700 varas to the northeast corner of survey No. 247, block 2, Houston & Texas Central Railroad Company; thence south 75 degrees west 2 miles to the northeast corner of survey No. 251; thence north 15 degrees west 1 mile to the northeast corner of survey No. 276; thence south 75 degrees west 9 miles to the northwest corner of survey No. 269; thence south 15 degrees east 4½ miles with the west line of block 2; thence south 2 miles; thence west 6 miles; thence south 21 miles; thence west 9 miles to the east line of the Lavaca Navigation Company surveys; thence north 14 miles to the place of beginning. Containing about 550 sections.

That afterwards, on, to wit, the 16th day of July, 1889, the said defendants unlawfully entered upon and dispossessed the plaintiffs, The State of Texas, of said land and premises, and withholds from plaintiff the possession thereof.

Plaintiff further represents that the defendants have used and occupied said land from the said July 16, 1889, until the present time, and the rents and damages for said use and occupation reasonably and fairly amounts to the sum of $25,000 per annum.

Wherefore and by reason of the premises, the State of Texas brings this suit and prays that on final trial the State of Texas have judgment for said land, for damages for the use and occupation thereof, for costs of suit and general relief.

C. A. CULBERSON,
Attorney General, for the State.

Filed November 27, 1891.

J. E. HOOPER,
Clerk Dist. Court, Mitchell Co., Tex.

Defendants' First Original Amended Answer.

STATE OF TEXAS
vs.
E. M. BACON and L. D. GRAVES *et als.*

Suit pending in the district court of Mitchell county, on change of venue from Scurry county, Texas. December term, 1891.

Now come C. C. Gibbs, E. M. Bacon and E. G. Graves, defendants in the above styled and numbered cause, and by leave of the court first had, file this their first amended original answer, in lieu of their general answer heretofore filed on the 23d day of October, 1891, and for amendment say:

They defend the wrongs and injuries when, &c., and say that the matters and things in plaintiff's petition filed herein are insufficient in law to entitle the said plaintiff to have and maintain its aforesaid action against these defendants, and of this defendants pray judgment, &c.

Defendants specially except to plaintiff's petition:

1. Because the said petition presents or constitutes an action in ejectment, or trespass to try title to land, such as cannot be
6 maintained by the State against one of its citizens, and of this defendants pray the judgment of the court, &c.

2. Because as between the State and its citizen, the action of trespass to try title is *quasi* criminal, because the same must be based upon the assumption that the citizen has been guilty of a willful wrong against his Government, and is in contravention of the presumption that the citizen is innocent of wrong until allegations are made of facts constituting the wrong and supported by testimony excluding reasonable doubt of his guilt. And plaintiff's petition contains no allegation of the wrongful acts of the citizen of the State which would constitute any right of action against a citizen, which when established by proof would support any right of plaintiff to a recovery.

3. Defendants further specially except to plaintiff's petition because the same does not give defendants any notice whatever of the nature and character of plaintiff's claim, nor of the supposed wrongs and injuries because of which plaintiff is aggrieved, and of which plaintiff complains. Upon all of which defendants pray the judgment of the court, &c.

Further answering, should defendants' demurrer and special exceptions be overruled, defendants deny each and every allegation in plaintiff's petition contained, and of this defendants put themselves upon the country, &c. Wherefore, &c.,

Further answering, defendants say that they are and have been for a long number of years true and law-abiding citizens of the State of Texas, performing every duty and complying with every exaction made of them by their State as citizens thereof; that the legislature of their State, by an act thereof passed on the 14th day of July, 1879, and an act amendatory thereof, of the 11th of March,

1881, offered for sale and proposed to sell to its citizens and to others its public domain, comprised and contained within certain counties named in said acts, at the rate of fifty (50) cents per acre, for the purpose of paying the public debt of the State, and for other purposes therein named.

That these defendants desiring to secure for themselves the benefits of said acts, by the purchase of a portion of the lands therein offered for sale, went to work and diligently applied their efforts to preparing themselves to purchase a portion of said lands, and
7 after the expenditure of much time and labor, and some considerable amount of money, they prepared themselves to purchase a portion of the lands thus offered for sale, and to pay therefor, complying with all the provisions of said acts. And thereupon, on or about the 1st day of December, 1882, while said statutes were in full force and effect these defendants made application to the surveyor of the Palo Pinto land district of said State, within which district the lands they desired to purchase are and were situated, and then a part of the public domain subject to be purchased under said acts, to become the purchasers of the public lands embraced within the boundaries designated in their application in writing. That the said surveyor received, approved and filed their said application, and these defendants requested and directed the said surveyor to survey the lands so contained within the limits set out in their application, as provided and required by said acts, and return the field-notes thereof to the general land office, so that these defendants under the provisions of said acts, upon compliance with the further provisions thereof, could obtain from the State patents therefor.

And the said surveyor of said land district aforesaid, having received, approved and filed their said application as aforesaid, thereupon agreed and undertook, as was his duty under the law so to do, to survey the land, make field-notes, record and return the same to the general land office, as required by the statutes aforesaid. And said surveyor of said land district represented to these defendants that he, thereafter, to wit: on the — days of January, 1883, by himself and by his authorized deputies, proceeded to and did regularly and legally survey the land so applied for by these defendants as aforesaid, approve, certify and record the field-notes of said surveys in the office of said district surveyor, in manner and form as by law required; and that soon thereafter, and within the time named in the said acts, to wit: on or about the 17th and 20th days of March, 1883, returned the field-notes of said surveys so made as aforesaid to the general land office of the State, as required by law. And thereupon these defendants allege that they paid all the fees due and required by law to be paid thereon to the land office, as will appear from the records of said office.

And these defendants having in so far fully and completely complied with and performed all the requirements of the said acts to entitle them to become purchasers of said lands thereafter,
8 to wit: on or about the 16th day of May, 1883, and the 19th day of May, 1883, and within the time prescribed by the pro-

visions of said acts, presented to the treasurer the certificate of the commissioner of the general land office exhibiting the fact that the field-notes of the lands desired to be purchased by them had been returned to and filed in said office as aforesaid, and that these defendants had paid all fees and charges to the State thereon, required by law, and then and there these defendants offered and tendered to said treasurer of the State the full amount of money necessary to pay the State for all of said lands at the rate of fifty cents per acre as the same had been surveyed and the field-notes thereof returned to the land office as aforesaid, into sections of 640 acres each, as provided and required by law.

These defendants further aver, that the said treasurer of the State of Texas, disregarding the rights of defendants, so as aforesaid regularly and legally acquired to said land, refused to receive the money so tendered in payment for the said land, and to give them a receipt and certificate for such payment, so that they might thereon proceed and procure patents to be issued to them for the said several sections, as they desired to have done, and further to pay all charges and dues to the State as they were ready, willing and able to do.

And defendants further allege that, by reason of arrangements which they had made at great trouble and expense to themselves, — were at all times anxious, able and ready to further comply with the provisions of the acts aforesaid by the payment of the money for the land so surveyed and the field-notes thereof returned to the land office, and included within the limits defined in their application aforesaid, as shown by the certificate of the commissioner of the general land office, at the rate of fifty cents per acre, as required by the law, and for such purpose made frequent application to and requests of the treasurer aforesaid to receive said money therefor, and to give them proper receipts therefor to be presented to the general land office, that they might obtain patents thereon for the lands so purchased by them as aforesaid.

That said treasurer persistently refused to receive said money and to give them receipts therefor until the 3d day of January,
9 1891, when these defendants paid to said treasurer the money for the following designated sections of land containing 640 acres each, to wit: Sections one (1) to one hundred and seventeen (117), both inclusive, in block B, and sections numbered from one (1) to two hundred and ninety-one (291), both inclusive, in block G, and sections numbered from one (1) to fifty-eight (58), both inclusive, in block M, being parts of the same land described and sued for by the State in its petition filed in this cause, all of said land lying and being situated in the counties of Scurry and Borden, in the State of Texas, and the same being a part of the public domain offered for sale by said plaintiff in accordance with the provisions of the acts aforesaid, at the rate of fifty cents per acre. And the said defendants paid to the said treasurer then and there, and the same was received by said treasurer, the sum of one hundred and forty-nine thousand one hundred and twenty dollars ($149,120.00) for and in purchase of two hundred and ninety-eight thousand two hundred and forty (298,240) acres of land, being part of the land

sued for and designated and described in plaintiff's petition, by numbers of sections and blocks designated by letters "B," "G" and "M" in plaintiff's petition; and thereupon the treasurer of the State executed and delivered to these defendants a receipt for said money, designating the sections by number and blocks by letters aforesaid, for which said money was paid, and the purchase of said land described therein was thereby perfected in accordance with the terms of the acts aforesaid; and in due course of the business of said treasurer's office separate receipts were executed and delivered by said treasurer for each and every one of said several sections of land, and the same were at once delivered to the commissioner of the general land office, and deposited in said office, in full and literal compliance with the requirements of the law.

And defendants hereby expressly and specifically disclaim any and all right, title or interest in and to all other lands described and sued for in plaintiff's petition, other than those hereinbefore described and set out, and paid for as aforesaid.

Defendants further aver that plaintiff's officers, representatives and employees in the general land office of the State have heretofore failed and neglected to delineate and define upon the maps in said office the lands herein claimed as properly belonging to defendants, by reason of which defendants are unable to furnish the court with a more definite description of their lands as claimed herein by them than as therein described by section number and block, and the plaintiff has by its pleadings also failed to give the defendants any more particular and definite description of the lands claimed by plaintiff than as herein given by defendants.

Defendants further answering say that it is not true as alleged by the plaintiff, that they, defendants, entered upon the premises sued for and took possession thereof, either by themselves, or by any one else for them, and thereby ousted plaintiff from the possession thereof; nor is it true, as alleged by plaintiff, that defendants have used and enjoyed the possession of said premises, or any part thereof; but on the contrary, defendants allege that the said plaintiff has hitherto and still withholds from defendants the possession and enjoyment of what is rightfully their property under the law, and defendants are informed and believe, and allege the fact to be, that the said plaintiff, through and by its general land office, has assumed and exercised control and the right to dispose of said premises, and has actually leased, sold, and otherwise disposed of parts of said land to parties who are occupying, possessing and enjoying the same, while the treasury of plaintiff has accepted and appropriated the money of defendants paid for said lands, and have appropriated the same by distributing it to the general revenue, public-school fund, and other purposes of said plaintiff, to the great wrong and injury of the rights of its citizens, these defendants.

The defendants respectfully represent that they are rightfully and justly entitled to have extended to them the title to said several sections of land hereinabove claimed by them by right of their purchase under said acts as aforesaid, by the issuance of patents

therefor by the general land office, as in other cases by law is provided.

And so defendants aver and represent, as hereinbefore alleged, the said plaintiff, The State of Texas, having received and receipted for the said sum of one hundred and forty-nine thousand, one hundred and twenty dollars ($149,120.00), and appropriated the same to its general and specific purposes, as all other money paid into the State on the purchase of lands is appropriated, said plaintiff hath not made provision for and doth not now offer
11 to return to said defendants the money paid as aforesaid, or any part thereof; and defendants say that the said plaintiff ought not to be permitted to proceed with the trial of this cause without the return, or tender to return to defendants the money so paid out by them and received and appropriated by said plaintiff; that the said plaintiff to be permitted to deprive these defendants of the lands so purchased by them as aforesaid, and in which they have a vested right, will be in violation of the Constitution of the United States, impair and destroy the obligation of the contract, and perpetrate an irreparable wrong and injury upon defendants.

That the defendants having in all respects fully complied with the provisions of the law in respect to the purchase of said lands, under which said lands were offered for sale by the plaintiff, their rights thereto become and were vested, and the act of the legislature subsequent thereto repealing said law, was under Article 2, sec. 10, sub. 1 of the Constitution of the United States, null and void as affecting defendants' vested right.

Wherefore defendants pray for judgment in their behalf, that the plaintiff take nothing by its suit, and that defendants have and recover of plaintiff the lands as herein claimed by them, and for a decree, mandatory in its terms, commanding and directing the commissioner of the general land office to issue to defendants, and in their behalf, the patents for the several sections of land numbered from one (1) to one hundred and seventeen (117), both inclusive, in block B, and from one (1) to two hundred and ninety-one (291), both inclusive, in block G, and from one (1) to fifty-eight (58), both inclusive, in block M in said Scurry and Borden counties, as the same are designated and delineated on a sketch made and returned by the surveyor of Palo Pinto land district, accompanying his return of the field-notes of said surveys to the general land office.

And defendants further pray, that if the judgment and decree of your honor's court shall not be effective to secure obedience thereto, in the issuance of patents to defendants, evidencing the conveyance of the title to the land as herein claimed, because of its being directed to the commissioner of the general land office, being the head of one of the executive departments of the State government, then defendants pray that the decree of your honor's court
12 be so made and framed as that the same shall declare and adjudge the title to the lands to be vested in the defendants, and shall operate and serve them as a muniment and title thereto.

Defendants further pray that if they have not asked for appropriate relief that they have such other further orders and decree as

may be necessary and proper in the premises to secure to them their rights, for special and general relief, and for all their costs in this behalf extended.

HANCOCK, SHELLEY & HANCOCK,
R. H. LOONEY,
Attorneys for E. M. Bacon and E. G. Graves.
T. D. COBBS, *Attorney for C. C. Gibbs.*

Filed Dec. 14, 1891.

J. E. HOOPER,
Dist. Clerk, Mitchell Co., Texas.

Plaintiff's First Supplemental Petition.

In the District Court of Mitchell County.

THE STATE OF TEXAS }
vs.
BACON & GRAVES *et al.* }

Now comes the State of Texas, with leave of the court, and files this, its first supplemental pestition, and says the first amended original answer is insufficient in law, and of this it prays the judgment of the court. And specially excepting to said answer, the plaintiff says it is insufficient in law, for the following reasons, to wit:

1. It is not shown that the lands claimed were vacant and unappropriated, or otherwise subject to be purchased by defendants under the law.

2. It is not shown that the land claimed was in fact surveyed in the field, for defendant, in sections of 640 acres each, by which alone they acquire any right to said land.

3. The plaintiff excepts to so much of said answer as insists that the State cannot recover herein unless the sum of money alleged to have been paid to the State treasurer on January 3rd, 1891, is returned, for that the failure to tender or return the same constitutes no defense to this suit.

13 Subject to these exceptions, the plaintiff denies all and singular the allegations of said answer, and demands strict proof thereof.

And specially replying thereto, the plaintiff says the defendants were not entitled or authorized to purchase the said lands, and did not comply with the law in reference thereto in any particular, and did not, in fact, purchase the same from plaintiff through any officer authorized to bind or conclude the plaintiff, and said lands were not at the times named by defendants on the market for sale.

The plaintiff says that if said defendants did in fact tender the treasurer the sum of money named, in 1883, as alleged, the treasurer properly refused and declined to receive the same, for that the defendants had not purchased the same from plaintiff, by complying fully with any existing law authorizing the purchase and sale

thereof; and if said defendant did in fact pay to the treasurer in 1891 the sum named in said answer, the said treasurer was not authorized by law to receive it, and this the defendant well knew, and said payment, if made, was so made after a full and explicit notice to the defendants that plaintiff repudiated and would vigorously contest the claim of defendants to said lands, and said defendants paid the same at their peril.

The plaintiff further shows that none of the requirements of said laws relating to the purchase of said lands were complied with by the defendants, E. M. Bacon and E. G. Graves, and any and all acts and certificates by the surveyor of Palo Pinto county and his deputies, alleging and purporting a compliance therewith, are wholly false and untrue, and were known to be such by said defendants when they were done, made and given, and were so done, made and given pursuant to a combination between said defendants and said officers, for the purpose of defeating and evading the laws and wrongfully and illegally acquiring a claim to said lands.

C. A. CULBERSON,
Attorney General.
R. S. HENRY,
Assistant for the State.

Filed Dec. 17, 1891.

J. E. HOOPER,
Dist. Clerk, Mitchell Co., Texas,
By TOM VAN TUYL, *Deputy.*

14 *Transcript and Order Transferring to Mitchell County.*

In the District Court of Scurry County, Texas, October Term, A. D. 1891.

THE STATE OF TEXAS, }
County of Scurry. }

THE STATE OF TEXAS }
vs. }
BACON & GRAVES *et al.* }

On this day came on to be heard the motion of defendants to change the venue of said cause for trial on the ground that there exists in the county of Scurry such a degree of prejudice against defendants as that they cannot expect a fair and impartial trial in said county, and the said motion having been supported by the affidavit of E. M. Bacon, one of the defendants, and the affidavits of B. Y. Duke, E. A. Panknin, E. Yarbrough and Thomas Montgomery, creditable citizens of Scurry county, and the same not being resisted on the part of the plaintiff by her attorney general, who was present in court as well as defendants' counsel. Now, therefore, the court having considered the same, and the said motion and affidavits being in due form of law as in such cases made and provided, it is therefore ordered and adjudged and decreed by the

court that the said motion be and the same is granted. It is therefore further considered and ordered that the venue of said cause be changed to the county of Mitchell as the county site of Mitchell county is nearest to the county site of this county.

It is further ordered that the clerk of this court at once transcribe all the orders made in this cause and it, together with all the original papers in said cause, be forwarded to the district clerk of Mitchell county, Texas.

THE STATE OF TEXAS, }
County of Scurry. }

I, H. B. Patterson, clerk of the district court in and for said county, do hereby certify that the above and foregoing is a true and correct copy of transcript of all orders made and pro-
15 ceedings had in our said court in the above styled and numbered cause.

Given under my hand and the seal of said court at office
[SEAL] in Snyder, Texas, this the 6th day of November, A. D. 1891.

H. B. PATTERSON,
Clerk District Court, Scurry County, Texas.

Filed Nov. 9, 1891.

J. E. HOOPER,
Dist. Clerk, Mitchell Co., Texas.

Findings of the Court.

In District Court Mitchell County, November Term, 1891.

THE STATE OF TEXAS }
vs. } No. 652.
BACON & GRAVES *et al.* }

This is a suit by the State of Texas to recover of C. C. Gibbs and E. M. Bacon and E. G. Graves the title and possession of certain lands described in the petition, situated in Scurry, Borden, Fisher, Kent and Howard counties, amounting to five hundred and fifty sections, each containing six hundred and forty acres.

The defendants disclaim as to all the land sued for, except four hundred and sixty-six sections, described in their answer.

The following are the conclusions of facts as found by the court, viz:

1. On December 1, 1882, E. M. Bacon and E. G. Graves made application to Joel McKee, who was then the surveyor of the Palo Pinto land district, as such surveyor to purchase the land in controversy under what is known as the fifty-cent act, approved July 14, 1879, and amended March 11, 1881, which said application was received and recorded by said surveyor on said day.

2. The land so applied for was situated at the time of application in the Palo Pinto land district and the said surveyor was the

proper officer to whom application for the purchase of the same should have been made.

16 3. Bacon and Graves paid the fees for filing the field-notes in the general land office entirely within the time required by law.

4. By the records of the land office the 117 sections of land of block "B" of the alleged Bacon and Graves survey purport to have been surveyed by H. M. Berry, deputy surveyor, on January 17, 18 and 19, 1883, that the field-notes of said sections were recorded in the surveyor's office on the 14th and 18th days of March, 1883; that said field-notes were returned to the general land office March 17, 1883, and the chain-carriers who purport to have assisted said Berry in making said survey are J. H. Miller, J. B. Pierce, Andy Burns, Ed. Wagner and H. C. Reed.

5. By the records of the land office ninety-one sections of land of block "G" of the alleged Bacon and Graves survey purport to have been surveyed by H. M. Berry, deputy surveyor, on the 18th, 19th, 20, and 22nd days of January, 1883, the field-notes thereof were recorded in the surveyor's office on March 14 and 15, 1883, and were returned to the general land office on March 17 and 20, 1883.

6. By the records of the land office the remaining 200 sections of block "G" of said survey purport to have been surveyed by E. A. Williams, deputy surveyor, on January 17, 18, 19, 20, 1883. The field-notes thereof were recorded in the surveyor's office on March 14 and 15, 1883, and were returned to the general land office March 17 and 20, 1883.

7. By the records of the land office twenty-five sections of block "M" of said survey purport to have been surveyed by H. M. Berry, deputy surveyor, on January 22, 1883. Field-notes duly recorded in surveyor's office March 14 and 15, 1883, and returned to the general land office March 20, 1883, except the field-notes of sections 26, 27, 28, 29, 30, 31 and 32 of said block "M," which were never returned to the general land office.

8. By the records of the land office the remaining 94 sections of said block "M" purport to have been surveyed by E. A. Williams, deputy surveyor, on January 20, 21, 22 and 23, 1883, the field-notes thereof were recorded in the surveyor's office on March 14, 16 and 17, 1883, and returned to the general land office March 20, 1883.

17 9. That by the records of the land office sections 33 to 68, inclusive of block "M," purport to have been surveyed by E. A. Williams on January 21, 1883.

January 21, 1883, was on Sunday.

10. By the records of the land office sections 251 to 291, inclusive of block "G," and sections 1 to 25, inclusive of block "M," and section 115 of block "M" purport to have been surveyed on January 22, 1883, and by the records of said office sections 99 to 114 inclusive, and sections 116 to 126, inclusive of block "M," and sections 1 to 12, inclusive of block "N," which latter are in block 27, H. & T. C. survey, purport to have been surveyed January 23, 1883.

11. By the records of the land office sections 1 to 12, inclusive of

block "N," purport to have been surveyed by H. M. Berry on January 23, 1883, the field-notes were recorded in the surveyor's office March 14 and 16, 1883, and were returned to the general land office March 20, 1883; that sections 13 to 27, inclusive of said block "N," also section 41, 42 and 47 purport to have been surveyed by Benj. Boydston on January 20, 1883, and field-notes returned to the land office March 20, 1883.

12. By the records of the land office sections 28 to 40 inclusive, sections 43 to 46 inclusive and sections 48 to 52, inclusive of block "N," purport to have been surveyed by Benj. Boydston on January 21, 1883, and field-notes returned to the land office March 20, 1883.

13. The surveyor of Palo Pinto land district certified to the respective surveys hereinbefore mentioned on the days said surveys purport to have been made.

14. None of the land included in this suit has ever been patented by the State under the Bacon & Graves purchase, and on the 26th day of May, 1890, Bacon and Graves transferred by deed of special warranty 579 sections of land to C. C. Gibbs, who holds the same as trustee for E. M. Bacon and E. G. Graves and others.

15. I further find as a matter of fact that none of the land in suit was actually surveyed upon the ground by the deputy surveyors, who purported to have done so, but they merely copied in the office of the surveyor of the Palo Pinto land district the field-notes of the "Elgin survey."

18 In July, 1873, the Houston and Texas Central Railway Company located certificates in Scurry, Borden, Howard, Kent and Fisher counties on lands known as blocks 27 and 97 of the Houston & Texas Central Railway Company survey, including that sued for herein, which said block 97 comprises surveys from 1 to 955, all of which were by virtue of land certificates issued to said company by the commissioner of the general land office of the State of Texas, and the field-notes thereof bear date "July, 1873," and was returned in the surveyor's office during the month of ——, 1873, and were filed in the general land office November 20 and 26, 1873, and all the lands in this suit were and are within the Texas & Pacific railway 80-mile reservation marked by the act of the legislature passed May 2, 1873.

The above survey is the "Elgin survey," the field-notes of which were adopted by the surveyor of Palo Pinto land district and his deputies in making out the field-notes of the land applied to be purchased by Bacon & Graves.

Blocks 97 and 27 were actually surveyed on the ground by Elgin in the manner in which it has been customary by surveyors in Texas to survey large bodies of land, that is by running the outside boundary lines of the blocks, or a part of them, putting up permanent landmarks and leaving the interior lines without running. These blocks, in writing up field-notes, were divided into 640-acre surveys, and the interior surveys were made without actually running the lines, and Elgin did not run all the lines of any section in blocks 27 and 97, unless, as he says, it was done by accident.

The field-notes of said blocks 27 and 97 have remained on file in the general land office since they were filed therein, and said lands are platted on the maps of said office. There are 33,280 acres of land in block 27, 611,000 acres in block 97.

16. Deputy Surveyors Berry and Williams had, prior to the adoption of the field-notes for Bacon & Graves, run lines and ascertained corners in blocks 27 and 97 and found them to be as correct as any work of that character in that part of the State, and were satisfied as to the substantial accuracy of said surveys.

Said surveys, as far as marked lines and corners were concerned, and in accuracy of work, were equal to or better than any other surveying in that part of the State, except that done for the Texas & Pacific railway, which was unusually accurate.

17. In December, 1882, and in January, February and March, 1883, Joel McKee was the surveyor of the Palo Pinto land district, and E. A. Williams and H. M. Berry were deputy surveyors under him.

18. I find that at the time E. G. Graves entered into the agreement with E. M. Bacon to purchase these lands, to wit: on the 29th and 30th November, 1882, — was an employee in the general land office at Austin as draftsman, and that he drew his salary for the entire month of November, 1882, as well as for the preceding ten months.

19. Bacon and Graves have neither paid nor offered to pay taxes on said land or any part thereof at any time, nor have they rendered any part of such land for taxes for any year except for 1891, when it was rendered by C. C. Gibbs, trustee.

20. Bacon and Graves at the time of the application by them to purchase said lands were not responsible parties, being worth less than $3,000 each, and had made no arrangements to procure more than enough money to pay for the filing, &c., of the field-notes, and afterwards in February or March, 1883, the promise of a loan of $5,000.

22. The Colorado river is one of the great rivers of the State. It runs through about twenty sections of block 97.

It is not a navigable stream where it flows through said block, but it is permanent water.

23. The Elgin survey of block 97, adopted by the deputy surveyors, Williams and Berry, is not made in conformity to the 50-cent act of 1879, and its amendment in 1881, as the surveys made on the Colorado river, which is permanent water, cross the same and have a greater frontage thereon than one-half the square of such survey; and that, too, where they are not surrounded by older surveys.

24. On the 16th May, 1883, Bacon and Graves tendered to the treasurer of the State $80,640.00, and on May 19th, 1883, tendered to said treasurer the further sum of $104,640 in payment of surveys Nos. 118 to 291 inclusive, block "G" in Borden and Scurry counties; surveys Nos. 1 to 119 inclusive, block "M," Scurry county; surveys No. 1 to 52 inclusive, block "N," Scurry

county; surveys 1 to 117 inclusive, block "B," Scurry county, and surveys 1 to 135 inclusive, block "G," Borden and Scurry counties, which said tenders were refused and declined by said treasurer. In January, 1891, Bacon and Graves paid to said treasurer on said lands $149,320, which was received by him under protest.

24. In December, 1882, the land in controversy was worth one dollar per acre. At present it is worth two dollars per acre for dry land and three dollars per acre for watered land.

From the foregoing facts I conclude that the plaintiff, The State of Texas, is entitled to recover in this suit on each of the following grounds, to wit:

1. Bacon and Graves were not responsible parties at the time they applied to purchase this land and could not purchase under the law.

2. They did not comply with the law by having the land surveyed, as was required by law, and therefore could not purchase it.

3. The survey as adopted was not made in accordance with law—is incorrect, totally so—in having a greater frontage on permanent water than is permitted under the acts of 1879 and 1881.

4. Bacon and Graves have never paid or offered to pay for said land until long after the expiration of the time allowed and required by law. The purported surveys of many of the sections of land for which they tendered payment on May 19, 1883, were made after the 50-cent act was repealed, and Bacon and Graves did not separate or offer to separate in their tender the surveys made before the repeal from those made after, and there was consequently no legal tender.

5. At the time Graves entered into an agreement with Bacon to purchase these lands he was an employé of the general land office, and his action was against the civil and criminal laws of the State.

6. I further hold that the State is not bound to return the money paid in January, 1891, to entitle it to a judgment for the land.

21 To which findings of fact and law the defendants in open court except.

The clerk of this court is hereby ordered to file the foregoing conclusions as a part of the record in this case.

WM. KENNEDY,
Judge 32d District.

Filed Jan. 2, 1892.
J. E. HOOPER,
District Clerk Mitchell Co., Texas.

Final Judgment of the Court.

In the District Court of Mitchell County, Texas.

THE STATE OF TEXAS
vs.
E. M. BACON *et al.* } No. 652.

On the 22nd day of December, A. D. 1891, came all the parties and the plaintiff dismissed the cause as to the defendant, The Houston and Texas Central Railway Company, and the plaintiff and the defendants announced themselves ready for trial, and the defendants' general and special exceptions to plaintiff's first amended original petition having been presented and considered, were by the court overruled, and thereupon the plaintiff and defendants announced themselves ready for trial, and neither party demanding a jury, the matters of fact as well as of law were submitted to the court, and the court having heard the pleadings and the evidence and argument of counsel, is of the opinion that the law is for the plaintiff. It is therefore ordered, adjudged and decreed that the plaintiff, The State of Texas, do have and recover of and from the defendants, C. C. Gibbs, trustee, and E. M. Bacon and E. G. Graves, the following described tract and parcel of land, situated in Scurry, Borden, Fisher, Kent and Howard counties, in the State of Texas, to wit: Beginning at the northeast corner of survey No. 170, block No. 25, Houston & Texas Central Railroad Company; thence west 13 miles; thence north 10 miles and 1,727 varas, to the northeast corner of survey No. 1, block N. 29, township 5 north, T. & P. R. R. Co.; thence north 77° *degrees* east with the north line of the Texas & Pacific 80 miles reservation 28 miles; thence east 7 22 miles; thence south 3 miles to the southwest corner of survey No. 59, block K, T. A. Thompson; thence east 5 miles to the southeast corner of survey No. 55, block K; thence south 2,700 varas to the northeast corner of survey No. 247, block 2, H. & T. C. R. R. Co.; thence south 75 degrees west two miles to the northeast corner of survey No. 251; thence north 15 degrees west 1 mile to the northeast corner of survey No. 276; thence south 75 degrees west 9 miles to the northwest corner of survey No. 268; thence south 15 degrees east 4½ miles with the west line of block 2; thence south 2 miles; thence west 6 miles; thence south 21 miles; thence west 9 miles to the east line of the Lavacca Navigation Company's surveys; thence north 14 miles to the place of beginning, containing about 550 sections. It is further ordered and adjudged by the court that a writ of restitution and possession in favor of the State of Texas be issued by the clerk of this court to the sheriffs of the counties aforesaid, commanding them to deliver the possession of said lands to the plaintiff. It is further ordered and adjudged by the court that The State of Texas, plaintiff, do have and recover of and from the defendants, C. C. Gibbs, trustee, and E. M. Bacon and E. G. Graves, all costs in this behalf incurred, for which let execution issue.

To all and every part of which judgment the said defendants except, and in open court give notice of appeal to the supreme court of Texas. And upon application made the parties are granted ten days after the adjournment of court in which to prepare and file a statement of facts herein. It is further ordered by the court that the original maps of the land in controversy be forwarded with the transcript of the record herein.

Defendants' Bill of Exception No. 1.

THE STATE OF TEXAS *vs.* BACON & GRAVES *et al.* } Suit Pending in the District Court of Mitchell County, at Colorado, Texas.

Be it remembered that on the trial of this cause the State, through her counsel, offered to introduce in evidence certified
23 copies of field-notes to surveys Nos. 1 and 2 in block "B" for E. M. Bacon and E. G. Graves.

That counsel for defendant thereupon objected, upon the ground that it was not proper for the State's counsel to select from all of the field-notes then in his possession two isolated sets of field-notes without introducing all of the field-notes. The defendants, through their counsel, then and there stated in open court that effort had been made upon the part of defendant to procure certified copies of the field-notes of the entire surveys in controversy from the land office, and was advised that the same could not be obtained because the clerks of the land office were then in a separate room writing up the field-notes for the State's counsel.

Whereupon defendants' counsel stated to the court that he was informed and believed that the attorney general then had in his possession all of the field-notes of said blocks of surveys in controversy, and called upon the attorney general to state whether or not such was the fact, who neither admitted nor denied that he had the same, but stated that such papers as were in his possession were his private papers as the attorney general of the State, and he declined to produce them.

Wherefore, upon his answer, defendants, through their counsel, requested the court to compel the attorney general to deliver the field-notes to the possession of the court, so that they could all be introduced in evidence at the same time, which request was both then and there refused, and defendants, in open court, then and there excepted to the ruling of the court and asks that this be taken as their bill of exception, and the same be made a part of the record in this case.

T. D. COBBS, *Attorney for C. C. Gibbs.*
HANCOCK, SHELLEY & HANCOCK AND
R. H. LOONEY, *Attorneys for Bacon & Graves.*

(O K.)

C. A. CULBERSON,
Attorney General.

Approved, and ordered to be filed as a part of the record in this case.

WM. KENNEDY,
Judge 32d District.

Filed Dec. 24, 1891.

J. E. HOOPER,
Dist. Clerk Mitchell Co., Texas.

24 *Defendants' Bill of Exceptions No. 2.*

STATE OF TEXAS
vs.
BACON & GRAVES *et al.* } Suit Pending in the District Court of Mitchell County, at Colorado, Texas.

Be it remembered that on the trial of the above-entitled cause, the plaintiff, through her counsel, offered in evidence an extract from Spofford's almanac for 1883, showing that the 21st day of January, 1883, was Sunday, to which evidence the defendants objected, for the following reason: Because it was not competent to prove the day of the week by any such testimony, which objection was overruled by the court, and said evidence was admitted, to which ruling the defendants excepted, excepting and tendering this their bill of exception, and pray that the same be made a part of the record in this case.

T. D. COBBS, *Attorney for C. C. Gibbs.*
HANCOCK, SHELLY & HANCOCK AND
R. H. LOONEY, *Attorneys for Bacon & Graves.*

(O K.)

C. A. CULBERSON,
Attorney General.

Approved and ordered to be filed as a part of the record in this case.

WM. KENNEDY,
Judge 32d District.

Filed Dec. 24, 1891.

J. E. HOOPER,
Dist. Clerk Mitchell Co., Texas.

Defendants' Bill of Exceptions No. 3.

STATE OF TEXAS
vs.
BACON & GRAVES *et al.* } Suit Pending in the District Court of Mitchell County, at Colorado, Texas.

Be it remembered that on the trial of this cause, the State, through its counsel, offered in evidence the certificate of the commissioner of the general land office, which is hereunto attached, stating that the field-notes to surveys 26 to 32, inclusive, of block "M,"
25 Bacon and Graves' survey, were never on file in the general land office. To the introduction of said evidence the defend-

ants objected, for the reason that the law does not authorize the commissioner of the general land office to state a fact not apparent from the records of his office, and for the reason that the commissioner who made this certificate had already testified in this case; that he had no connection with the land office prior to January 1st, 1891, and all information that he had acquired from the records of the land office had been so acquired by him since the first day of January, 1891.

Said objection was overruled by the court and said certificate was read in evidence. To which ruling of the court the defendants, through counsel, excepted, and tenders this, its bill of exception, and prays that the same be made a part of the record of this case.

T. D. COBB, *Attorney for C. C. Gibbs.*
HANCOCK, SHELLY & HANCOCK AND
R. H. LOONEY, *Attorneys for Bacon & Graves.*

(O K.)

C. A. CULBERSON,
Attorney General.

Approved and ordered to be filed as a part of the record in this case.

WM. KENNEDY,
Judge 32d District.

Filed Dec. 24, 1891.

J. E. HOOPER,
Dist. Clerk Mitchell Co., Texas.

THE STATE OF TEXAS, }
County of Travis. }

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the field-notes of sections 26 to 32, block M, both inclusive, of the alleged Bacon and Graves surveys, in Scurry, Borden and adjoining counties, were never filed in the land office at Austin, and are not now on file in said office, as appears from an examination of the files and other papers connected with said survey.

[SEAL.] Given under my hand and seal of office, this October 30th 1891.

W. L. McGAUGHEY,
Commissioner.

26 *Defendants' Bill of Exceptions No. 4.*

STATE OF TEXAS
vs.
BACON & GRAVES *et al.* } Suit Pending in the District Court of Mitchell County, at Colorado, Texas.

Be it remembered that on the trial of the foregoing case, the plaintiff, through her counsel, offered in evidence the following answers to interrogatories Nos. 7 and 10, of the witness E. G. Graves, which were taken and propounded to him in the case pending in the dis-

trict court of Scurry county, Texas, after the plaintiff had proven the signature of the witness E. G. Graves thereto.

The answers of said witness were taken in said cause so pending in Scurry county district court, in which the case was No. 23, and the plaintiffs were Bacon and Graves, the defendants J. Wright Mooar and J. W. Mooar, and the answers of said witness to said interrogatories are as follows:

To the 7th interrogatory he answers: We did not have enough money to purchase said lands. We procured the money through Captain B. L. Crouch, and a tender of the money was made to the State treasurer for the purchase of said land.

To the 10th interrogatory he answers: I do not remember any such understanding between ourselves and the surveyor. I was in Palo Pinto during the time the surveyors were making out the field-notes, and knew they were doing so. I do not remember whether I left before they were completed or not; if so, I went to Big Springs and was either in Big Springs or on the road. During the remainder of the time the field-notes were being made out, Hal Bacon and myself left together with some of the field-notes, and Joel McGee left with the balance. About a week elapsed from the time I applied for the field-notes until I received them.

That said defendants, through their counsel, objected to the introduction of the same upon the grounds:

First. That the paper purported to be, and was, the original record from said cause, and not a certified copy thereof, as required by law.

27 Second. That the same could not in any way be admissable in testimony in this cause to bind any of the defendants herein, because neither of them were parties to said cause, except Bacon and Graves alone, and that the other defendants were strangers thereto and had no opportunity to cross-examine the witness upon the question propounded, which objection the court overruled. To which ruling of the court defendants then and there excepted and now tender this, their bill of exception to the same, and pray that the same may be made a part of the record hereof.

I presented the above bill of exceptions to C. A. Culberson, attorney for the State, and he declined to agree to it.

R. H. LOONEY,
Attorney for Defendants.

Examined, approved and ordered to be filed as a part of the record in this case.

WM. KENNEDY,
Judge 32d District.

Filed December 24, 1891.

J. E. HOOPER,
District Clerk, Mitchell Co., Texas.

Agreement to Send up Original Maps.

STATE OF TEXAS vs. BACON & GRAVES *et al.* } Suit Pending in the District Court of Mitchell County, at Colorado, Texas.

It is agreed by and between the parties to this suit that the following maps which were introduced on the trial of this cause certified to under the hand and seal of the commissioner of the general land office, to wit:

The map returned with the Bacon and Graves location, dated 1883; the map of Jack Elgin of block 97, dated 1873; the map of George Spiller, State surveyor, of block 97, dated 1888; also the map attached to G. W. Pressler's depositions, showing the land district, dated 18—, may be each taken up as original papers
28 with the transcript for the inspection of the supreme court, without having the same copied in the record.

C. A. CULBERSON, *Attorney General.*
T. D. COBBS, *Attorney for C. C. Gibbs.*
HANCOCK, SHELLY & HANCOCK AND
R. H. LOONEY, *Attorneys for Bacon & Graves.*

Filed January 22, 1892.

J. E. HOOPER,
Clerk Dist. Court, Mitchell Co.

Statement of Facts.

In the District Court of Mitchell County, Texas, November Term, 1891.

THE STATE OF TEXAS vs. BACON & GRAVES *et al.*

Be it remembered that on the trial of the above numbered and entitled cause, the following evidence was adduced by plaintiff and defendants, and the same is a full and complete statement of all the testimony in said case:

The State introduced the following agreement:

In the District Court, Scurry County, Texas.

THE STATE OF TEXAS vs. BACON & GRAVES *et al.*

It is hereby agreed and stipulated between plaintiff and defendants that the following are the facts in this case, namely:

1. That in July, 1873, the Houston and Texas Central Railway Company located certificates in Scurry, Borden, Howard, Kent and

Fisher counties, on lands known as blocks 27 and 97 of the Houston and Texas Central Railway Company survey, including that sued for herein, which said block 97 comprises surveys from 1 to 955, all of which were, by virtue of land scrip or certificates issued
29 to said company by the commissioner of the general land office of the State of Texas and the field-notes thereof bear date "July, 1873," and were recorded in the surveyor's office during the month of ——, 1873, and were filed in the general land office November 20th and 26th, 1873, and all the lands embraced in this suit were and are within the Texas and Pacific railway 80-mile reservation, marked by the act of the legislature of the State of Texas, entitled "An act to adjust and define the rights of the Texas and Pacific Railway Company within the State of Texas, etc.," passed May 2nd, 1873, and which said act may be used in evidence to the same extent as if it had been fully set out and copied herein. Said field-notes of the Houston and Texas Central railway survey have remained on file in the general land office since they were filed therein, and said lands are platted on the maps of said office.

2. That there are 33,280 acres of land in block 27 and 611,000 acres in block 97 of said H. & T. C. survey.

3. That in December, 1882, and in January, February and March, 1883, Joel McKee was the surveyor of the Palo Pinto land district and E. A. Williams and H. M. Berry were deputy surveyors under him.

4. That on December 1, 1882, E. M. Bacon and E. G. Graves made application to Joel McKee as said surveyor to purchase the land in controversy in this suit, 33,280 acres of which is situated in said block 27 and 341,860 acres is situated in said block 97 under what is known as the Fifty-cent act approved July 14, 1879, and amended March 11, 1881, which said application was received and recorded by said surveyor on said day, and is as follows, to wit:

"PALO PINTO, TEXAS, *December* 1, 1882.

"To the surveyor of Palo Pinto district:

"SIR: By virtue of an act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and investment of the proceeds of such sale, approved July 14, 1879, and an act to amend sections 1 and 6, approved March 11, 1881, we, Elbert M. Bacon and Everett G. Graves, hereby make application for and file on the following lands in Borden and Scurry counties, to wit: Beginning at the northeast corner of survey No. 170, block No. 25, H. & T. C. R. R. Co.; thence west 13 miles; thence north 10 miles and 1,727 varas to the northeast corner of survey No. 1, block
30 N-. 29, township 5, N. T. & P. R. R. Co.; thence north 77 degrees east with the north line of the Texas and Pacific 80 miles reservation 28 miles; thence east 7 miles; thence south 3 miles to the southwest corner of survey No. 59, block K, T. A. Thomson; thence east 5 miles to the southeast corner of survey No. 55, block K; thence south 2,700 varas to the northeast corner of survey No. 247, block 2, H. & T. C. R. R. Co.; thence south 75 degrees west 2 miles to the northeast corner of survey No. 251; thence north 15

degrees west 1 mile to the northeast corner of survey No. 276; thence south 75 degrees west 9 miles to the northwest corner of survey No. 268; thence south 15 degrees east 4½ miles with the west line of block 2; thence south 2 miles; thence west 6 miles; thence south 21 miles; thence west 9 miles to the east line of the Lavaca Navigation Co. surveys; thence north 14 miles to the place of beginning. Containing about 550 sections.

"ELBERT M. BACON.
"EVERETT G. GRAVES."

5. That of the land sued for sections 97 and 98, in block "M" of the alleged Bacon and Graves survey, are situated partly in Scurry and partly in Fisher county; that sections 115, 116 and 117 of said block "M" are situated partly in Scurry and partly in Kent county; that 38 sections in block "N" of said alleged survey, from 15 to 52 inclusive, are situated in Howard county, and the balance of said land is situated in Scurry and Borden counties.

6. That Bacon and Graves paid the fees for filing the field-notes in the general land office entirely within the time required by law

7. That by the records of the land office the 117 sections of land of "block B" of the alleged Bacon and Graves survey purport to have been surveyed by H. M. Berry, deputy surveyor, on January 17, 18 and 19, 1883; that the field-notes of said sections were recorded in the surveyor's office on the 14th and 18th days of March, 1883; that said field-notes were returned to the general land office March 17, 1883, and the chain-carriers who purport to have assisted Berry in making said survey are J. H. Miller, J. B. Pierce, Andy Burns, Ed. Wagner and H. C. Reed.

8. That by the records of the land office 91 sections of land
31 of block "G" of the alleged Bacon and Graves survey, purport to have been surveyed by H. M. Berry, deputy surveyor, on the 18th, 19th, 20th and 22d days of January, 1883, the field-notes thereof were recorded in the surveyor's office on March 14th and 15th, 1883, and said field-notes were returned to the general land office on March 17th and 20th, 1883.

9. That by the records of the land office the remaining 200 sections of block "G" of said alleged survey purport to have been surveyed by E. A. Williams, deputy surveyor, on January 17th, 18th, 19th and 20th, 1883, the field-notes thereof were recorded in the surveyor's office on March 14th and 15th, 1883, and said field-notes were returned to the general land office March 17th and 20th, 1883.

10. That by the records of the land office 25 sections of block "M" of the alleged Bacon and Graves survey purport to have been surveyed by H. M. Berry, deputy surveyor, on January 22d, 1883, the field-notes thereof were recorded in the surveyor's office on March 14th and 15th, 1883, and said field-notes were returned to the general land office March 20th, 1883.

11. That the field-notes of sections 26, 27, 28, 29, 30, 31 and 32 of said block "M" are not on file in the general land office.

12. That by the records of the land office the remaining 94 sec-

tions of said block "M" purport to have been surveyed by E. A. Williams, deputy surveyor, on January 20th, 21st, 22d and 23d, 1883, the field-notes thereof were recorded in the surveyor's office on March 14th, 16th and 17th, 1883, and said field-notes were returned to the general land office March 20th, 1883.

13. That by the records of the land office sections 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67 and 68 of said block "M" purport to have been surveyed by E. A. Williams on January 21, 1883.

14. That the records of the land office show that the chain-carriers who purport to have assisted Williams and Berry in surveying said blocks "G" and "M" are Jerry Perkins, James Self, J. B. Pierce, H. C. Reed and Ed. Wagner.

15. That by the records of the land office sections 251 to 291, inclusive of block "G," and sections 1 to 25, inclusive of block "M,"
and section 69 to 98, inclusive of block "M," and section 115
32 of block "M," purport to have been surveyed on January 22, 1883; and by the records of said office sections 99 to 114 inclusive, and sections 116 to 126 inclusive, of block "M," and sections 1 to 12 inclusive, of block "N," which latter are in block 27, H. & T. C. survey, purport to have been surveyed January 23, 1883.

16. That by the records of the land office sections 1 to 12 inclusive, of block "N" of said alleged survey, purport to have been surveyed by H. M. Berry on January 23, 1883, the field-notes were recorded in the surveyor's office, March 14 and 16, 1883, and said field-notes were returned to the general land office March 20, 1883. That by the records of the land office sections 13 to 27 inclusive, of block "N" of the alleged Bacon and Graves survey, section 47 thereof and sections 41 and 42 thereof purport to have been surveyed by Benjamin Boydston, on January 20, 1883, the date of the record of the field-notes does not appear and said field-notes were returned to the general land office March 20, 1883.

17. That by the records of the general land office, sections 28 to 40, inclusive, sections 43 to 46 inclusive, and sections 48 to 52, inclusive, of block "N" of the alleged survey for Bacon and Graves purport to have been surveyed by Benjamin Boydston, on January 21st, 1883. The date of the record of the field-notes does not appear, and said field-notes were returned to the general land office March 20th, 1883.

18. The records of the land office show that the chain-carriers who purport to have assisted Benjamin Boydston and H. M. Berry in surveying the land in block "N" are William Moore, A. G. Denmark, J. H. Davis and John Cook.

19. That the surveyor of Palo Pinto land district certified to the respective surveys, hereinbefore mentioned, on the days said surveys purport to have been made.

20. That none of the land included in this suit has ever been patented by the State under the Bacon and Graves purchase, and that on the 26th day of May, 1890, Bacon and Graves transferred, by deed of special warranty, 579 sections of land to C. C. Gibbs, who

holds the same as trustee for E. M. Bacon and E. G. Graves and others, the said land so transferred being described in said deed as follows: "Five hundred and seventy-nine (579) surveys of
33 six hundred and forty acres of land each, which were located by E. M. Bacon and E. G. Graves, within the Texas and Pacific reservation, located and surveyed under and by virtue of what is known as the fifty-cent act, 'approved July 14th,' A. D. 1879, and the amendment thereto, approved March 11th, A. D. 1881, and now situate in the counties of Scurry, Borden and Howard, in the State of Texas," and which deed was recorded in Scurry county on the 31st day of January, 1891.

21. That the defendant, E. G. Graves, was employed in the general land office at Austin, as draughtsman, for the entire year 1882, except for the month of December, and that he drew his salary for the entire month of November, 1882, as well as for the preceding ten months

22. That defendants Bacon & Graves have neither paid, nor offered to pay, taxes on said land or any part thereof at any time, nor have they rendered any part of such land for taxes for any year, except for 1891, when it was rendered by C. C. Gibbs, trustee.

23. That either party to this suit may introduce on the trial any other pertinent and competent testimony.

24. That at the time of the application by them to purchase the lands in suit, and continuously since then, Bacon and Graves were and have been worth less than three thousand dollars each.

(Signed) C. A. CULBERSON, *Attorney General.*
T. D. COBBS,
Attorney for H. & T. C. R'y Co. and C. C. Gibbs.
HANCOCK, SHELLY & HANCOCK, AND
R. H. LOONEY,
Attorneys for Bacon and Graves, Defendants.

The State introduced the following evidence:

1. Spofford's almanac of 1883, showing that January 21st, 1883, was Sunday.

2. The following extract from the report of W. C. Walsh, commissioner of the general land office, made to the governor, September 1st, 1882, viz.: "These latter changes are attributed largely to the effects of the act of July 14, 1879, better known as the 'fifty
34 cents law.' This act, wise perhaps in its fundamental idea of paying our bonded debt with our surplus domain, has proved, through want of proper safeguards, a misfortune rather than a benefit. The introduction in our State of what is known as the Gould and the Palmer-Sullivan system of railroad construction, brought with it enterprise and capital from all parts of the world; and a law contemplating the gradual alienation of our domain was used as the means of acquiring vast solid bodies of from 100,000 to 1,000,000 acres. Whether this will result ultimately in a benefit or injury to our State the future must determine; but its immediate and patent effect is to paralyze all transactions in private lands, to

beget a feverish and unhealthy mania for speculation, and an utter contempt for negotiations, where thousands of acres do not figure. It has flooded this office with work beyond anything in its history, and under its stimulus speculators have filed upon vast bodies of land surveyed and returned to this office years ago, by virtue of alternate certificates, alleging that technical errors have forfeited the surveys.

"In the efforts to check this flood I have ruled and so instructed surveyors that the even numbered, or school sections, surveyed by virtue of these certificates, are segregated from the public domain, and are not liable to appropriation, except as school lands. If you should deem any legislation necessary or advantageous under these circumstances, I would respectfully suggest that it be recommended for early action."

3. The following extract from the message of Governor Roberts, delivered to the legislature January 10, 1883, viz.:

"It was then recommended that the minimum price of these reserved lands should be raised to one dollar, and that two millions of acres of them should be set apart to the university, not so much as a gratuitous donation as in compensation, and as a substitute for lands taken away from the university by the constitution of 1876, which was then fully explained. Bills to protect these lands and to set apart a portion of them passed the senate, but failed to be passed in the house of representatives. It may be asked why it was proper that these lands should have been valued and offered at fifty cents per acre, and in three short years an effort was made to raise the price to one dollar per acre. These lands may be worth from five to fifty dollars per acre, when the time arrives at which they can be put fully into practical use as agricultural and pastoral lands. Most of them were not and practically could not be used for any purpose, and the value of fifty cents was then properly placed upon them, upon an estimate based upon the experience of the past, and upon the prospects under the then exising circumstances, as to the length of time that might elapse before the lands could be thus utilized, and bring their full intrinsic value.

"If the purchaser had bought them then he would have paid the full value (more than they brought at private sale), and he would have taken the risk of carrying them with the necessary expense. In three years the whole prospect, as to the length of time for their utilization, had changed by the extensive information of their quality and uses that had during that time been acquired, and unprecedented demand for such lands, which could hardly have been anticipated. Hence, upon this mode of calculating the value of wild lands, which must always be resorted to in order to fix any values upon them at all, these lands were better worth one dollar per acre, as a purely business transaction, in April, 1882, than fifty cents per acre in July, 1879, when they were first offered for sale. It was therefore proper that the State should then have raised the price to at least that amount.

Had the recommendation been heeded and favorably acted on

Texas would have now either many millions of acres of land that have been sold, or the purchase of them secured under the law, or double the amount of money for which they have been and will be sold.

For, as I learned from the commissioner of the general land office, there was filed in his office up to March 1, 1882, applications for 278,333 acres of these land-, but payment had been made upon 193,446 acres of them, and over 100,000 acres of them were "scraps," that is, small tracts of less than 640 acres in organized counties, and only about 80,000 acres in the unorganized counties, where the great bodies of these lands are situated.

"Since the adjournment of the special session, on the 5th of May, 1882, there have been, up to the 1st of January, 1883, filed in his office applications for 3,150,480 acres, and he has unofficial, though reasonably accurate information, of applications to be shortly
36 made, in the time allowed by law, for about 3,200,000 acres, making the applications filed and to be filed since the close of the special session for 6,350,480 of these lands sold and to be sold at fifty cents per acre by the State.

"It would be useless now to recount the conflicting views in the legislature, and the objects of interest and speculation outside of it, which may have tended to prevent the enactment of the measures recommended. Their failure has permitted this sacrifice of the property of the State by its sale at a price far below its value, as is evident by the brokerage speculations made in the sales of it to capitalists." (House Jour., pages 14, 15.)

The State introduced the following from the house journal of the eighteenth legislature, 1883, which was by consent considered as having been read at length:

1. The statement on page 18 of the introduction of a bill by Mr. Frymier on January 11th, 1883, to withdraw the public lands from sale.

2. The statement on page 20 that Mr. Foster of Limestone introduced a bill on January 12th, 1883, to repeal the acts of July 14th, 1879, and March 11th, 1881.

3. All on page 35 that has reference to house bills Nos. 6 and 18.

4. All on page 54 having reference to the same bills.

5. All on pages 58 and 59 having reference to the same bills.

The State introduced the following from the senate journal of the eighteenth legislature, 1883, which was by consent considered as having been read at length:

1. The statement on page 7 that Senator Pfeuffer introduced a bill on January 11th, 1883, to suspend the sale of public-school, university, asylum, and all vacant and unappropriated public lands in this State.

2. The report of Matlock, chairman, on page 27, in reference to senate bill 22, which was an act to suspend the sale of *of* the
37 public-school, university, asylum, and vacant lands of the State.

3. All on page 31, with reference to house bill 18 and senate bill 22.

4. All on page 35, with reference to senate bill 22.

5. Report of Matlock, chairman, on house bills 6 and 18, on page 38.

6. Report of Martin, chairman, on page 40, that senate bill 22 had been engrossed.

7. Report of the chief clerk, on page 48, that the house concurred in the senate amendment to substitute for house bills 6 and 18.

The State introduced copy of a deed from E. M. Bacon, E. G. Graves, John W. Maddox, F. M. Maddox, C. E. Anderson, Frank Hamilton, James R. Johnson and John Hancock, transferring to C. C. Gibbs, as trustee, five hundred and seventy-nine surveys of 640 acres each, which are located by E. M. Bacon and E. G. Graves within the Texas and Pacific reservation, by virtue of what is known as the fifty-cent act, approved July 14, 1879, and the amendment thereto, approved March 11, 1881, and situated in Scurry, Howard, Borden, Fisher and Kent counties in the State of Texas, said deed being dated May 26, 1890, and containing a special warranty, and reciting a consideration of $176,000 to be paid.

The State introduced a certificate from W. L. McGaughey, dated October 30, 1891, that the field-notes of 26 to 32, block "M," both inclusive, of the alleged Bacon and Graves survey, in Scurry, Borden and adjoining counties were never filed in the land office at Austin, and are not now on file in said office, as appears from an examination of the files and other papers connected with said survey.

The State introduced a certificate from George W. Smith, secretary of state, that Howard county was organized June 15, 1882, Scurry county was organized June 24, 1884, Fisher county was organized April 27, 1886, Borden county was organized March 17, 1891, and Kent county is unorganized.

38 The State introduced a map attached to the depositions of C. W. Pressler, and marked Exhibit "A," showing the several land districts of the State of Texas in July, 1873, by an act of April 29, 1874, and by the revised statutes, which said map it is agreed shall go to the supreme court with the transcript and as a part thereof.

General N. G. SHELLEY, witness for the State, testified:

I resided in Austin in 1882 and 1883. I knew Mr. E. M. Bacon at that time. I believe he resided in the city of Austin. I have not any memory as to dates. I knew the defendant, E. G. Graves. I don't know where he resided during the years 1882 and 1883. I cannot locate his residence at that time. I have never traveled from Austin to the town of Palo Pinto. I am not much of a traveler. My impression is that Major Bacon resided in the city of Austin in 1882 and 1883.

JOHN W. MADDOX, witness for the State, testified:

I resided in Austin in 1882 and 1883. My recollection is that I did not know E. G. Graves at that time. I may have known him

by sight as an employee of the land office without knowing his name. I have traveled from the city of Austin to the town of Palo Pinto. The most direct route would be to leave Austin at 9.30 p. m. and arrive in Fort Worth at about 7 o'clock next morning, and at about noon I think you would be in Gordon, and then it would be a drive of about fifteen miles to Palo Pinto. In 1882 and 1883 the railroad facilities were the same as now. I could not say definitely at that time how many hours it would take to go from Austin to Palo Pinto. I think about eighteen hours, or near that. To leave at 9.30 p. m. you would arrive at Palo Pinto at about 3 o'clock of the following day.

Major E. M. BACON, one of the defendants, witness for the State, testified:

During the year 1882 and during November, 1883, E. G Graves lived in Austin. During the month of December, 1882, and after the first of December, he removed to San Antonio, the place that had been his home in boyhood. He had come to Austin to
39 make it his temporary home. I have been from Austin to Palo Pinto. It took about eighteen hours to make the trip. My recollection is that Mr. E. G. Graves and myself left Austin for Palo Pinto in 1882 on the 29th or 30th day of November, in the evening.

(The State here handed the witness the original application to purchase the land.)

This paper is the original application to purchase the land and is in my handwriting. It was filed on the 1st day of December, 1882. It was recorded at 5 o'clock on the same day. I cannot remember whether Mr. Graves and myself left Austin for Palo Pinto on the 29th or 30th, but it was on one of those days. Mr. Graves might have stopped over at Fort Worth; I do not know, however. Before I left Austin I had made a rough draft of what I was going to do. I had not entered into any agreement with Graves prior to his resignation on November 29, 1882. I had talked the matter over with Graves very frequently prior to the 30th day of November, 1882. Mr. Graves and myself left Austin on the 29th or 30th of November for Palo Pinto for the purpose of entering into the business of purchasing the land in controver-y. The paper dated "Gordon, December 1," is in my handwriting and is one of the original papers filed in order to make the purchase of the land in controversy. Graves signed this one in person. The other paper is dated Palo Pinto. I signed Mr. Graves' name to it. I had authority to so sign his name. I had assurance that if I entered into this business of purchasing the land I would be able to get the money to cover at least the expenses of making the file and all the expenses incident thereto. We had no definite understanding until after the file was made that we could get the money, but Mr. Richard King, a personal friend of mine, had agreed to let me have enough money to make the files. He had been a personal friend of mine for many years. I had no arrangements whatever with him, but merely an

understanding between us as friends. Mr. B. L. Crouch, of Frio county, in February or March, 1883, agreed to furnish me the money to pay the land out. Mr. Graves has an interest of a fraction over four thousand acres of the land in controversy. I have about the same quantity. We have between us a little over sixteen thousand acres.

C. C. Gibbs as trustee, Judge Hancock, John Maddox, Charles
40 E. Anderson, Frank Hamilton, Frank Maddox and James Johnson, I think, claim title to the balance of the land. I do not know whom Gibbs represents. I never heard him say, but I think Gibbs is the land commissioner of a railroad. I do not know the style of his title. I think, though, he is land commissioner of the H. & T. C. railroad or the Southern Pacific system. I cannot tell who furnished the money that was paid to the treasurer on the 3rd of January of this year. I think Mr. Gibbs, as trustee, and Mr. Hamilton procured the money together. I made the necessary arrangements with Maddox Brothers & Anderson for the money when the time came. Maddox Brothers & Anderson are large dealers in lands. This arrangement was made with Maddox Brothers & Anderson, I think, in the year 1890 in the spring. I am not aware that Mr. Hamilton is connected with the land business. He is a banker at Austin. I do not know that he is president of a Minnesota land company in Austin. I think, perhaps, the arrangement with Mr. Gibbs was made by Maddox Brothers & Anderson and Judge Hancock. I do not know how many acres Maddox Brothers & Anderson claim. I do not know how much Judge Hancock claims. I presume the interest of Mr. Gibbs as trustee covers the interests of all other parties. I do not know how much Johnson and Hamilton have. The interest of Bacon and Graves is sixteen thousand acres. We turned over the balance of the land to the other parties in consideration that they would pay the land out and that Bacon and Graves should retain sixteen thousand acres. I have not leased any of the property in question. All that matter has been left entirely to the trustee. Previous to the appointment of the trustee I did not lease any land to any person. We brought a suit against the Jumbo Cattle Company and obtained judgment against it for rent. I do not know whether the money due on the judgment has been paid. I presume Mr. Gibbs and the other gentlemen who had management of the whole thing know. Mr. Gibbs did not have control of the suit when we brought it. The whole suit has been turned over to him as trustee. The entire business in regard to this land has been turned over to C. C. Gibbs as trustee. I do not know that I owe E. A. Williams any money for what work he did in the matter. I made no agreement with him as surveyor. Mr. Graves made the agreement. I made an agreement with Mr. McKee, and Mr. Graves may have made subsequent arrange-
41 ments connected with it. I never took any interest in the money part of the business, and do not know how much money E. A. Williams was to receive. I think Mr. Graves made an agreement with E. A. Williams, deputy surveyor, to pay him $550. One hundred and fifty dollars in cash was paid him and the balence was to be paid when we got the patents to the land in contro-

versy. I believe Williams is a deputy surveyor. I remember I would have had management of some of this business, but I was taken very ill and knew nothing about it. I do not know how much of the land C. C. Gibbs, as trustee, has leased. I have heard that Mr. Tankersly was agent for C. C. Gibbs. I never met him until recently. I never knew him before that time. I never heard of Mr. Panknin, of Scurry county. I have turned the whole matter over to C. C. Gibbs, but do not know what he has done. I do not know anything about owing Mr. McKee anything. I do not know how much is due Mr. H. M. Berry. E. A. Williams and H. M. Berry were deputy surveyors of the Palo Pinto land district.

A. J. SCARBOROUGH, witness for the State, testified:

I have lived in Scurry county since April, 1881. At that time I was engaged in the grocery business in that county, and I also ran a hotel. I know the land in controversy in this suit—block 97, H. & T. C. railway survey. In 1882 and 1883 the market value of the land was $1.00 an acre. I think it would be worth $2.00 an acre for the whole block now. That is the tax rendition now. Dry land is being sold constantly at $2.00 per acre, and watered land at $3.00 per acre. Men are buying it from the State. I do not know whether Mr. Gibbs is selling any of the land, but I believe he has sold some to Mr. Duke. Mr. Duke is one of the parties who made an affidavit for a change of venue in this case from Scurry county. Mr. Duke bought the land claimed by him some time in the spring of 1890. Mr. Tankersley was up there at that time and represented himself to be an agent of C. C. Gibbs, trustee. Some time in the spring of 1890 Mr. Tankersley came up to Snyder and tried to lease some of the land in block 97 to the settlers. He brought up a printed lease. I did not think the printed lease a fair proposition. He did not lease any of the land to amount to anything, and since then has not been back. He harrassed the settlers a great
42 deal in trying to get them to lease. He tried to take possession of the land and exercise control over it as the agent and representative of Mr. C. C. Gibbs, trustee. He proposed to lease the land at five cents per acre. The Colorado river runs through a portion of block 97. It runs through seven or eight sections, I think. It is the same stream that runs by this city—Colorado. It is a good large stream. It is one of the principal rivers of the State. The width of the river as it runs through the section of country where block 97 is located is from fifty to sixty feet across. At other places it is not quite so far. The average width, however, is about sixty feet. It has some water in it all the time. It is a permanent water-course. It ranks in this country with the Brazos river. I think there is only one river in Texas that equals it in size, and that is the Brazos. The Brazos, I think, covers more territory and is larger than the Colorado. The portion of the Colorado river that runs through block 97 is permanent water. The Colorado river in block 97 averages sixty feet in width, and is permanent water the year round. Bull creek is a permanent water-course, and runs through

the northern portion of block 97. The Double Mountain fork of the Brazos river runs through block 97, and is a prominent and permanent stream. Its average width is about 200 feet as it runs through block 97. I mean 200 feet from bank to bank. I do not know how many settlers there are on the land in question claiming title under the State. I suppose about 150 families. During the months of September and October, 1882, I never met a person named H. M. Berry on block 97 in Scurry county surveying a part of said block. I never met any such person or surveyor. I never have met Mr. Berry at all. At that time I was engaged in the grocery and hotel business at Snyder. I do not know of any family that lived eight miles south of Snyder on Canyon creek at that time. It is hardly possible for any one to have done any surveying on said block at that time without me seeing him, for I was hunting constantly on said block 97 to keep my hotel supplied with fresh meat. I do not think it hardly possible for any surveying outfit to have been there without my having found it. I think it is about two and a half miles from the town of Snyder to the eastern boundary line of block 97. There is one section between the town and block 3, H. & G. N. railway. I had made it a point to hunt about once a week, and the places mentioned were my hunting grounds. I paid a good
43 deal of attention to hunting out lines, as I was interested in land matters. I never saw a person by the name of E. A. Williams surveying in the fall of 1882 on block 97 or anywhere in this country. I was interested in the land, and saw every surveyor who came here to get all the information I could from him. I do not think that Mr. Williams was up here at that time. I know Mr. Looney did some surveying up here. During September and October, 1882, I was over the larger portion of block 97; frequently traveled over portions of said block at that time, and I saw no one surveying, nor did I see any signs whatever that would indicate that surveying had been done at that time nor at any time near then. If any one had done any surveying on block 97, or on the western boundary in the fall of 1882, it would have been almost impossible for me not to have known of it, for I frequently traveled over portions of said block, and in that country I was looking for signs of surveying, corners, etc., and I saw none on this land.

On cross-examination the witness testified:

I know the land patented in Peter Smith's name; I cannot recollect who surveyed the land. The surveyor who surveyed it was at my hotel; I cannot recollect his name; I think he lived at Sweetwater. Mr. Berry was not one of them. I think after the county had been organized, in 1885, the land was sectionized. I think the lands were bought under the fifty-cent act. Mr. Wise informed me that Smith had had the land surveyed before I came there. The lines were run, if any were run, in 1881, before I arrived in Scurry county, by Mr. Wise of Abeline, I think. I do not know of my own knowledge who ran out the Peter Smith lines, but do know that some of the parties were at my hotel and laughed about getting ahead of me in this country. I arrived in Snyder on the 9th

day of April, 1881. I went to get Mr. Marshall, district surveyor, to run out some lines for me. I wanted to locate on some of the land. Mr. Marshall advised me that Mr. Holt and Mr. Wise had surveyed the land that I desired to locate on, and that it had been filed on. The Peter Smith's line runs within a mile of Snyder. If Mr. H. M. Henderson surveyed the land in the fall of 1882 I have no knowledge of it, unless he was with the parties who resurveyed it in sections for Mr. Jarvis of Fort Worth. At a later date,
44 whenever parties bought any of the Smith land they had it surveyed and sectionized. I think Holt and Wise ran around it. I do not know H. M. Henderson and do not know H. M. Berry. I had no knowledge of Mr. Berry. I did see a lease signed by a person agreeing to lease land from Mr. C. C. Gibbs as the trustee for block 97. I saw some of the papers signed up and saw Mr. Tankersley sign them. Mr. Tankersley for Mr. Gibbs leased some of the lands to Mr. Yarborough or to Mr. Brigman, and Mr. Tankersley showed me the papers and I saw them signed up. I did not see Yarborough sign the papers, but saw Mr. Tankersley and Mr. Brigman. This was in the spring of 1890. I do not remember the number of sections leased. I do not know the exact number of sections in block 97. It is near nine hundred; I forget the exact number. In the fall I hunted once a week. I did not go over the entire block in one week. It would take a week or so to go over the land. I ran a hotel in the fall of 1882. It might be possible that Mr. Williams knew me as a hotel-keeper. I might have been out there and not have seen him. I always kept an eye open for every surveyor that came along as I wanted to get information from them. I do not recollect how many times I have seen Judge Looney surveying up there. I did not see him do any work. Mr. Harness, a neighbor of mine, told me that Judge Looney had run out his section. I don't think I saw Looney when he surveyed Moore's pasture. I don't think I saw Looney when he surveyed the section for John Lackner on Canyon creek. The Harness I speak of is Fletcher Harness, a son of the mayor of Colorado. I have seen some of block 97 surveyed. I saw Mr. Camp, Mr. Wilmeth and Mr. Goodwin do some surveying. They all lived right in the town of Snyder. Mr. Camp now lives in Borden county. I suppose there are about one hundred and fifty families of settlers there. Some of them had been there four or five years. They keep on coming in, buying land from the State. The county surveyors were surveying it for them. The only lands selling are the school lands. I think the State is selling whatever lands it sells by the corrected railroad surveys and not by the original railroad surveys. I do not know whether Mr. Duke lives on an even or an odd section. Nobody lived on Canyon creek, eight miles from Snyder, in 1882. John Lackner was not there. He was on Canyon creek in 1883. I don't remember whether he made proof to the sec-
45 tion of land he was settled on on the 1st of January, 1881. I am not certain about the dates. He had a sheep camp on the section he settled on in 1881 to 1882, but this was not on Canyon creek. The only ranch that was there at that time was twelve

miles from Snyder. There was no one living on Canyon creek eight miles from Snyder. There was an old ranch when I came there. It has changed hands so often that I could not say who was on it. I claimed section 254 in block 97. I filed on it and paid taxes on it for four or five years. The State and railroads surveyed it and cut off a good deal, and only left me a fraction of a section, and finally compromised. They cancelled as much as they cut off. My wife made a refile.

On redirect examination witness testified:

Peter Smith's land runs down to the Colorado river. It is surveyed so that the section lines do not cross the river.

The State introduced the answers of JOEL MCKEE to the cross-interrogatories, as follows:

E. A. Williams was appointed deputy surveyor on November 21st, 1882, and H. M. Berry on December 23rd, 1882. Am informed by D. L. Cunningham, formerly district surveyor, that E. A. Williams was deputy under him and did some work in western counties. Williams was recommended to me by several citizens of that section of country, whose names I do not remember, and Berry was recommended by John Pollard, of Palo Pinto county. There are no field-books in my possession or in the surveyor's office at Palo Pinto of any survey made by Williams or Berry, or surveys alleged to have been made by them, in Scurry, Borden, Howard and Kent counties, and I so informed the present attorney general by letter in August, 1891. I certified to the correctness of the field-notes of about 375,000 acres of land surveyed in Scurry, Borden, Howard and Kent counties for Bacon and Graves by Williams and Berry, on the 17th, 18th, 19th, 20th, 21st, 22nd and 23rd days of January, 1883. It is a physical impossibility for them to have made an actual survey of said land in that time. It is not a fact that Williams, Berry and others, including a son of Bacon, simply copied field-notes of the H. & T. C. R'y Co. survey of block 97 in my office, in Palo Pinto, upon which I made the certificate. Bacon and Graves were not
46 present in the office when any field-notes were being copied. I know nothing of any copying of notes in my office. Bacon and Graves have both been in my office, but at no such time as this. I was never present in Scurry, Borden, Kent or Howard counties with Williams or Berry. I do not know that Williams or Berry ever surveyed any of the lands in suit before the field-notes were made for defendants. I have carefully examined the records of the surveyor's office at Palo Pinto, and can find nothing there showing that Williams or Berry ever surveyed any land in the counties named, except for Bacon and Graves. I cannot name any person for whom Berry and Williams surveyed any of the land in suit, prior to the alleged survey for Bacon and Graves. I don't understand that I certified to the survey of 35 sections of block "M" being made by E. A. Williams on January 21st, 1883, and 22 sections of block "M" by Ben. Boydston on said day, but simply certified to the correctness of the notes. I never certified to any number of

surveys being made by any of my deputies on any one day. I do not know that Williams and Berry, and others that assisted them, merely copied on any one day the field-notes of the H. & T. C. R'y survey. Never was on the land in controversy. I only found the notes correct and so certified. I knew it by calculation by established rules of surveying. I know nothing of the H. & T. C. notes being used. I relied upon my deputies and my own calculation as to correctness of notes. I never in person took the field-notes prepared for Bacon and Graves and endeavored to identify any of the land in suit. I can testify that any competent surveyor could identify the land by a knowledge of the geography of the country and the names of some of the streams called for—for instance, the Colorado river. I never was on the land. I am not acquainted with J. H. Miller, J. B. Pierce, Andy Burns, Ed. Wagner, H. C. Reed, Jerry Perkins, James Self, J. H. Davis, John Cook, William Moore or A. G. Denmark. No notes were copied in my office. I know of no one engaged in copying notes. I never copied any notes, hence no fees for such work was promised or paid. The length of time required for two surveyors to survey on the ground 375,000 acres of land would depend upon the location of the land and the obstacles and difficulties opposing them. Not knowing the land I cannot say. It would depend on the size of the surveys, location of obstacles, etc.

47 JOE CAMP, witness for the State, testified:

I have resided in Scurry county since 1881, in May. I know the Colorado river as it runs through the lower end of block 97. I have been on the river frequently. The average width of the river, in my opinion, as it runs through this block would be from forty-five to sixty feet. It is one of the chief rivers of the State. It is considered a permanent stream of water in this country. I have been in this country for a good many years and have never known the Colorado river to go dry. It always has water in it. I know the Double Mountain fork of the Brazos at the upper end of it. It would be hard to tell you what the average width of the river is as it runs through block 97. I think it is broader than the Colorado. I suppose it would average 150 feet. It is considered a permanent stream of water.

On cross-examination the witness testified:

I could not say how far it is from where the Colorado river leaves block 97 it is to the head of it. It is not a river up there; I mean where it runs through block 97. It is called a river way up in Borden county. It stops running down here often. There are some places where the water stops running entirely over the top of the ground, and some places you can step over, but the river always has holes of water in it, but sometimes the stream runs under the sand. I have often dug down under the sand in the bed of the river a foot or two and found water in abundance. It is a characteristic of the river in this country that whenever it appears to be

dry there is an undercurrent under the sand. The large holes mentioned by me are, I suppose, fed by living streams of water from the source of the river. I do not know exactly where the corners of block 97 are. I have some idea. I know of some survey corners in that block on the east side of the river. I do not know how many surveys the river runs through, but I know it runs through some surveys on block 97. The surveys are not laid out to run on the front of the river entirely. I am a surveyor and my father is a surveyor, and we have run some lines on that block. My father was once a surveyor in Scurry county. I cannot tell you the corner of any particular survey on this side of the river, because I never run it.

48 On redirect examination the witness testified:

I know the river runs through a part of the southern end of block 97, and that the surveys cross the river and do not front 950 varas on the river.

G. L. AUTRY, witness for the State, testified:

I reside in Mr. Looney's pasture, on the Colorado river, on block 97. The river will average in his pasture from forty to sixty feet in width in block 97. In his pasture it is called permanent river. It never goes entirely dry. Sometimes the water runs under the sand.

On cross-examination the witness testified:

The permanency is in the channel. There is not always water in the channel of the river. It runs under the sand in some places. You could not call it dry. I have lived out here since the 26th day of last December. Not quite a year. Mr. Looney has got a pasture on block 97. He keeps stock in it and has fenced the river up in his pasture for the use of his stock.

GEORGE C. SHELMADINE, witness for the State, testified:

I live in Colorado, and have lived here for three years. Previous to this time I resided in Scurry county. I moved there in 1882, and engaged in the sheep business. I had headquarters on Bluff creek about a mile north of the river. I roamed all over the country for from fifteen to thirty miles around. I was at my headquarters on Bluff creek in September and October, 1882. During the months mentioned I carried my sheep about five miles above the river toward the mouth of Bull creek. Bull creek is in block 97. During these months I know I did not see any surveying parties. In the fall of 1882 I traveled within ten miles square. I roamed all over the country that winter. I used to go up Bluff creek towards the "E. H. P." ranch at that time. I never saw any surveying parties on this land, block 97. I know the Colorado river as it runs through block 97. The river is not very large up that way. The width of it as it runs through block 97 is about forty yards. I have seen it dry. It has water holes and

channels; they are sometimes very small, yet there is, I pre-
49 sume, always an undercurrent under the sand. I have frequently dug down into the sand in the bed of the river for a foot or two and usually found water. Whenever the river appears to be dry in places, water can be found under the sand without going very far.

On cross-examination, witness testified:

I had some sheep-herders with my sheep. I sometimes followed my sheep myself. In September or October, I think, I moved my camp and stayed with the sheep. I moved every two, three or four weeks. My sheep would very seldom go farther than two or three miles from my camp. I moved once during the month of October. I had two camps during two months. I had one near the mouth of Bluff creek. The camps were two miles apart. One was north of the other, towards Snyder.

The State introduced answer of W. C. Walsh to fourth cross-interrogatory:

I did refuse to have mapped and examined the Bacon and Graves surveys.

H. M. BERRY, witness for the State, testified by deposition on cross-examination, as follows:

I met Mr. J. H. Miller, Andy Burns, Ed. Wagner and, I think, H. C. Reed in the fall of 1882. J. B. Pierce, J. H. Davis and John Cook, I can't remember them now. There was one man that worked for me at that time that I cannot now remember. It may have been John Cook or H. C. Reed. J. H. Miller then lived at Abilene, and I have not heard of him since we were on the work together. The other men that I met were transient men that I picked up as I needed them. I do not know anything further of them than what work they did for me. I do not know the whereabouts of any of them now. I have no recollection of ever doing any work on block No. 27, H. & T. C. R'y Co.

I did not in 1883 make a survey on the ground of 116 sections of 74,240 acres of land in block "B," 89 sections or 56,960 acres of land in block "G," 25 sections or 16,000 acres of land in block "M" and 12 sections or 7,680 acres of land in block "N," all
50 in the alleged Bacon and Graves survey. I only adopted the field-notes from the records in the office. I made the certificate to each set of field-notes as I adopted them.

I have never made any calculations on the line as to how long it would have taken for me to make an actual survey on the ground of 154,880 acres of land, nor have I calculated as to how many miles would necessarily have been traveled in making such a survey; hence I cannot say.

I was on the land covered by the Bacon and Graves field-notes several times in the fall of 1882. I have been told that some of the Bacon and Graves notes were not received in the general land office. I do not know which notes were rejected, consequently I

cannot say what land is in controversy, for I do not know which particular surveys are included in this suit. At the time I was on the ground there were but few families in Scurry and Borden counties. Mr. Scarborough, with whom I met, lived at Snyder. There was one family that lived about eight miles southwest of Snyder on a creek called Cañon creek. I cannot now remember his name. There was one ranch northwest of Snyder on Deep creek. I do not know the addresses of any of them now. I was in camp all the time I was in that section and I did not stop with any family.

In answer to cross-interrogatory No. 6, the witness refers to his answer to direct interrogatory No. 3, which is as follows:

1. I was deputy surveyor of Palo Pinto land district, Texas, during the latter part of December, 1882 and 1883, under Joel McKee, district surveyor of Palo Pinto land district. I was appointed deputy about December 17th, 1882. My bond was approved in the early part of 1883.

2. I did surveying in Borden and Scurry counties in the latter part of 1882 on what was known as block 97, H. & T. C. R'y Company. I did work in Scurry county prior to Joel McKee's term of office on the southern and eastern boundary of block 97. I worked with H. M. Henderson, who said he was deputy surveyor under D. L. Cunningham, district surveyor at that time of Palo Pinto land district. We were establishing the eastern boundary of said block No. 97, in order to locate the vacancy between said block 97 and the H. & G. N. R'y Company's block No. 3, and also the H. & T. C. R'y Company's No. 2. To do this we ran lines out into block 97
51 wherever witness trees were called for in order to definitely locate said eastern boundary. We started at the southern corner of section 84, block 97, which was well defined by a rock pile and witness trees. We then ran east and found the southeast corner of section 82 in same block. It was defined by a witness tree which we found. We then ran north with the east line of No. 97 until we came to the west line of H. & T. C. R'y Co.'s block No. 2, and found all the established corners that were called for in block 97 for several miles from said line. I afterwards worked with my own outfit on block No. 97 in Scurry and Borden counties.

3. I am not positive for whom the work above described was done, but my recollection is that Mr. Henderson told me it was done for Peter Smith of Fort Worth. I did not do any surveying on the ground for E. M. Bacon and E. G. Graves. I only adopted for them work that had already been done.

In answer to the seventh cross-interrogatory, the witness refers to his answer to direct interrogatory No. 3, which is fully copied immediately above.

There were no field-notes made out by me at the time the work was done on the ground covering lands in block 97. We had the original notes, and merely traced lines to find the old corners. There was no chance to get chain-carriers on the ground, hence we always took chain-carriers with us when starting out on a trip. J. H. Miller, Andy Burns, Ed. Wagner, and I think H. C. Reed carried

the chain for me at different times. I do not now remember what particular work they were on. I cannot tell their present post-office address. I did not run the four section lines of surveys. It is my recollection that I testified by deposition on the 21st day of January, 1890, before J. H. Hamberlin, the county clerk of Somerville county, Texas, at Glen Rose, in case No. 23, of Bacon & Graves *v.* Mooar *et al.*, in the district court of Scurry county, that I did not run the four section lines of the Bacon and Graves surveys. I cannot say that I ran the four section lines of any survey of the H. & T. C. R'y survey. I cannot now remember all the work I did. I cannot now remember any further than stated in my answers to direct interrogatories. I was in the town of Palo Pinto
52 when the defendant E. G. Graves reached that place to have the field-notes copied. I returned to Palo Pinto about December 15, 1882. My recollection is that I testified to such fact before the county clerk of Somerville county. E. G. Graves was present a part of the time when we were copying the field-notes for Bacon and Graves in the surveyor's office at Palo Pinto, but I have not knowledge that Mr. Bacon was there at all. Mr. Graves knew that no actual survey was being made on the ground for him. E. A. Williams was the only man that assisted me. Graves, Bacon nor a son of Bacon did any work for me. I did not need any field book in copying the field-notes, as the notes I had when on the ground were on record in the Palo Pinto land office. I was only tracing lines to establish the boundary of block 97. I did testify in a former case.

"In the early part of 1883 I was called on by Mr. E. G. Graves to do some surveying for Bacon and Graves in Scurry county on lands known as block 97, H. & T. C. R'y Company. I adopted the work in connection with E. A. Williams, whose present place of residence I do not know."

"I adopted the field-notes of the H. & T. C. R. R. Co. surveys of block 97 for Bacon and Graves.

"I did not make an actual survey on the ground for Bacon and Graves. The field-notes written up, signed and adopted by E. A. Williams and me covered lands within block 97, H. & T. C. R. R. Co.

"Bacon and Graves' field-notes were in fact adopted from the field notes of block 97, as recorded in Palo Pinto, the work on the ground having been done by the surveyor who surveyed block 97 for H. & T. C. R. R. Co.

"I never calculated the entire amount of land in block 97, consequently I cannot say how much land it contains, and as I do not know what particular sections are included in this suit I cannot say what sections I ran lines on.

"I was not on the land at any time I was making out the field-notes for Bacon and Graves. I never did at any time make an actual survey of block 97, or any part thereof for Bacon and Graves, or of any part of the land in controversy for Bacon and Graves. I suppose the dates upon which the surveys for Bacon and Graves purport to have been made are the dates that field-
53 notes were adopted and copied in Palo Pinto. The field-notes

copied the first day were signed and dated as the first day's work and so on all the way through.

"I did not go on the ground before adopting the field-notes for Bacon and Graves and try to identify the land for Bacon and Graves by the description given in the field-notes.

"I would suppose any competent surveyor could identify the land for Bacon and Graves by the description given in the field-notes, in the same way that he could identify any other lands surveyed in Texas.

"Bacon and Graves did not pay or promise to pay anything in excess of the fees allowed by law."

The State introduced the answers of E. A. WILLIAMS to the cross-interrogatories, as follows:

Being asked if he was acquainted with Jerry Perkins, James Self, Andy Burns, Ed. Wagner, J. B. Pierce and H. C. Reed and their residences, he answered: My chainmen were cowboys, sheepherders, transient. Do not know where their homes were. Neither do I know their present place of residence. Have already stated.

I do not know how many field-notes I prepared on the 21st day of January, 1883. Yes, it is a fact that I adopted the original H. & T. C. survey, while at the same time I had my own data at hand. I did not count the field-notes which I prepared on the 17th, 18th, 19th and 20th of January, 1883. I think I certified to the surveys of those days. I adopted the field-notes from data at hand. It would require about 30 days, going 350 to 400 miles, to survey 198,480 acres of land on the ground, about 12 miles per day. I was on the land prior to the Bacon and Graves survey in 1882–1883. Do not remember the names of my assistants. Was at Moore's ranch several times. Do not know how long I stayed on the ranch at any one time. "There were no neighborhoods those days in that country. I was in both Scurry and Borden counties. I did a great deal of surveying in block 97 prior to making the field-notes for Bacon and Graves. I cannot give the names and post-office address of any one. Have been away from there seven years. I think I went from Sweetwater. Do not remember the
54 date. Do not know when I returned. Did not return my field book to the surveyor's office at Palo Pinto. It was my property, not his. I failed to find my field book. Sometimes I would take chain-carriers with me and at other times get help at the ranches. I did not run the four section lines of surveys before making the field-notes for Bacon and Graves, when surveying there, and so testified in another case in 1890. I cannot give the number of any survey I run the four lines of. I do not know any section of the H. & T. C. R'y survey, included in this suit, on which I run any line. Do not know how many of them I run any line of and found correct."

Being asked if it were not true that he was in the town of Palo Pinto when the defendant Graves reached that place to have the field-notes copied, and that he proceeded at once to do so, and if the defendant Graves, and at other times the defendant Bacon, were

not present in the office in Palo Pinto when and where the field-notes were being copied, and if said defendants did not know that no actual survey was being made for them on the ground, and if Bacon or Graves or a son of Bacon copied any of the field-notes, he answered:

"Yes; either that or the next day Mr. Graves was at Palo Pinto a day or so and went away. I did not see nor hear of Mr. Bacon being in town. I do not know what they knew about it. Mr. Bacon's little boy done some writing I think."

Being asked, "Is it not true that when none of the lines of the sections had been run on the ground by you, you simply copied the field-notes of the H. & T. C. R'y survey, without verification, for Bacon and Graves, and certified that you had surveyed them?" he answered:

"Yes, if there were any such sections." I do not know which of the sections purporting to have been surveyed by me I verified by running a line or lines on the ground, nor which of them I copied bodily from the H. & T. C. R'y survey, nor do I know which of said sections I run a line or lines of. I was not on the land at any time I was making out the field-notes for Bacon and Graves. I think the dates on which the surveys for Bacon and Graves purport to have been made are the dates the field-notes were copied and made out at Palo Pinto. I never in person took the field-
55 notes prepared for Bacon and Graves and endeavored to ide-tify the land. Never did any more work in that block.

Being asked how, not having made such examination, he could testify that any competent surveyor could identify the land, he answered:

"Well, I am sure that I could identify any section of that survey." I found one or two errors, which I corrected. The field-notes do not need correcting. I think that Bacon and Graves paid me $100 or $150 at the time. They owe me a balance of $400.

The State introduced the answers of JOHN E. ELGIN to the first, second, third, fourth, fifth, sixth, seventh, eighth and tenth cross-interrogatories, as follows:

Base lines of block No. 97 were run and the creeks were generally meandered, or, rather, we run nearly all lines that crossed creeks or that run through timber where lines could be designated by marks on the land or natural objects. Where creeks or other natural objects are called for by course and distance in the field-notes the line had always been run on the ground.

I was employed by the Houston and Texas Central railway to make a survey of block 97. G. W. Pope and George W. Angle, practical surveyors, assisted me in making the survey. I think we were engaged on block 97 about forty days, usually working from twelve to fifteen hours per day. Eight men were engaged as chain-carriers regularly, sometimes twelve—four for each compass party, who worked by turns a half of a day at a time. I had thirty-two men in my party—four mounted flagmen, the others were water-carriers, cooks, wagoners and guards. I do not know the residence

of any of them except the surveyors above named. About one-half of them were Mexicans and the balance young men now dispersed over the country. On reflection, there was with me Jack Coke, James Hom, Waco; Isam Harrison, Stephenville; James Ware, McLennan county; —— Ransom, Fort Bend county, and others that cannot be recalled now. I paid these men for about four months' time, but cannot say how many days of it was actually occupied on block 97.

56 No, the survey was not made by simply running base lines and making calculations from these. Usually, under the instructions of Mr. R. M. Elgin, we were most careful in running the lines along rivers and creeks, or where there were natural landmarks to definitely locate lines and corners.

I do not know that all four lines of any section were ever run out. If so, it was an accident, though in a number of cases all four corners were actually established on the ground. I cannot say how many.

I kept field books, which I think I gave to Mr. Henderson, of Abilene, as surveyor in Taylor county, to assist him in following my footsteps upon this and other blocks in that section of the country.

I made a working plat of the work I did on block 97, and marked and identified upon said map each and every corner and each and every line which I actually made upon the ground while doing said work. The map I returned to the general land office is made upon a scale of 2,000 varas to the inch, about double the scale of the usual county maps. It covers a territory embraced in blocks 97 and 98 for the H. & T. C. railroad, and I think perhaps some other railroad survey, probably the Columbus Tap and the Houston & Great Northern, or Texas & New Orleans, and embraces the waters of the Colorado, Double Mountain and Salt forks of the Brazos, up and on to the Blanco canyon. The corners established on the ground are designated on the map by a small circle, thus ⊕ and where there were bearings I had them written out on the map. I think the map is signed by me or by Mr. George W. Angle, who, if I remember rightly, drew the map.

I cannot say how much land is contained in block 97, nor how many sections of 640 acres each there are in said block, nor how many miles it would be necessary for a surveyor and his chain-carriers to travel to make an actual survey of the land in said block by sections upon the ground, if he actually ran each line of each section upon the ground.

I was deputy surveyor of Jack county when I claim to have surveyed this land.

The State introduced a plot of the Bacon and Graves survey attached to the depositions of W. L. McGaughey and marked

57 Exhibit "E," which purports to have been filed in the general land office March 17th, 1883, which copy, under the agreement between the parties, will be sent up to the supreme court with the transcript and as part thereof.

The State introduced certified copy from the general land office of the map of block 97, made under the direction of J. E. Elgin, filed in the general land office December 20th, 1873, which said map, under the agreement between all parties, will be sent up to the supreme court with the transcript as part thereof.

The State introduced certified copy of map from the general land office made by George Spiller, State surveyor, in 1887–'8, which said map, under an agreement between the parties, will be sent up to the supreme court with the transcript and as a part thereof.

The State introduced answers of JAMES S. HOGG to first and second direct interrogatories, as follows:

My name is James S. Hogg; residence, Austin, Texas; occupation on 3d day of January, 1891, the attorney general of the State of Texas.

About the date named, State Treasurer Lubbock notified me, as attorney general, that the representatives of Bacon and Graves wanted to make a payment in part or in full for the lands claimed of the State by the said Bacon and Graves. I went into the treasurer's office and there met the treasurer, the chief clerk, Mr. Wortham, Mr. Frank Hamilton, and, I believe, Mr. John Maddox. The latter two proposed "to tender" to the State a sum of money amounting to over a hundred thousand dollars, claimed to be due for lands located by Bacon and Graves. The treasurer asked me what he should do. After notifying him and all parties present that the State ignored Bacon and Graves' claim and would contest it in the courts, I told the treasurer to accept the money, as the tender, with his refusal to accept it, was equivalent in law, so far as the rights of the parties were concerned, to the actual payment of the money. In this conversation I notified Hamilton and Maddox, as well as the treasurer, that the State would waive no rights, but that it disputed the validity and justness of Bacon and Graves' claim, and would contest it and all rights thereunder. I re-
58 peat the effect and substantially the language of that conversation. Immediately after this, my recollection is, the money was tendered by the said parties and accepted by the State treasurer.

The State introduced the answers of W. B. WORTHAM to the fourth and fifth cross-interrogatories, as follows:

The payment made during the year 1891 was received by the treasurer in accordance with the advice of the attorney general, and the treasurer was informed by him that the State would resist the claim upon which the payment was offered and received, and the matter was so understood by all parties present and interested at the time of the payment of the money, $149,120 into the treasury.

When the payment was received by the treasurer the treasury department did not know whether the land in question had or had not been surveyed as required by law, nor did the department know what knowledge Bacon and Graves had thereof.

H. A. GOODWIN, witness for the State, testified:

I hold the office of surveyor of the district composed of Scurry, Kent and Garza counties, called Scurry land district. I have been the surveyor of said district since 1884, with the exception of one term. I did not follow the occupation of surveyor previous to 1884. I have been over block 97 a good deal and worked on said block. The Colorado river flows through the southern and southwestern parts of block 97. It flows through twenty sections of block 97. I know where Judge Looney's pasture is. He has got the river fenced up. He takes in a good many sections in his enclosure, both the railroads' and the "children's" land. The average width of the Colorado, as it runs through block 97, as mentioned, is from about eighty to one hundred and sixty feet. It is a permanent river. It is one of the principal rivers of the State. On this block it is a permanent river. A permanent river runs through the upper part of block 97, namely, the Double Mountain fork of the Brazos river. It runs through about thirty miles of block 97 and is something over one hundred yards in width. The sections of land on block 97, laid off on the Double Mountain fork of the Brazos river and the Colorado river, are in squares,
59 and do not front 950 varas to the section on said rivers.

There is no section either in the northern or the southern portion of block 97 fronting on the river, as required by the statute. The lines of the surveys lying contiguous to the river cross the river. The Peter Smith land is on the east boundary of block 97. There is nothing between it and block 97. The sections of land belonging to Peter Smith that lie contiguous to the river front 950 varas to the section on the river. None of the Smith lines cross the river. Peter Smith's land was bought under the fifty-cent act, namely, acts of 1879 and 1881. The so-called Bacon and Graves surveys purport to have been made in squares. I have never seen the plot or field-notes of those surveys. (The attorney general hands the witness a map purporting to show the plot of the Bacon and Graves surveys.) This map indicates that the surveys are in a square and that none of them front on the river according to the statute, namely, 950 varas to the section, but that the section lines cross the river. The survey of block 97, claimed to have been made by J. E. Elgin in 1873 is not a correct survey, but the surveys are grossly inaccurate and radically wrong. I know this because the Elgin field-notes call for 1,900 varas a side for each square section, and in some places I find that the side called for is 1,900 varas and in others where it calls for 1,900 varas it is 1,980, and in other places there are less than 1,900 varas where 1,900 varas are called for. In a great many cases actual measurement shows that the distances are greater than called for in the field-notes. In some places we would have to make a change of from two to four degrees in the variation to hit the corners. I would call the survey that was made by J. E. Elgin one that was based on a continuous or traverse line or a regular traverse line survey. There are very few original corners that I could find as established by Elgin. After diligent search I was able to find only about fifteen, that is corners that could be identified by the

field-notes. I have never found any stake as called for in Elgin's field-notes. If I found any corners they were either a stone mound or a rock mound. I have been over nearly all of block 97 and found no stakes. In all of my experience in surveying on block 97 I have found the J. E. Elgin surveys radically wrong and incorrect. As I understand the law, wherever the surveys cross the river they are radically wrong and would have to be entirely reconstructed in order to be corrected. I have never found a stake which might have been left on block 97 by E. A. Williams or H. M. Berry and I have surveyed all over this block. On the map as made by Grorge Spiller I find a short tier of sections running across block 97 from east to west, and here on the Bacon and Graves map I find that the short tier is not in the same position as indicated on the Spiller map, but is below. As I understand this law, in order to make a correct survey of this land the parties proposing to purchase would not be allowed to cross a navigable stream or permanent water, but would have to front 950 varas to a section on said river or permanent water, and in order to make these surveys correct, as made by Mr. Elgin, none of the original lines could be used at all, but the surveys would have to be reconstructed, as they are radically wrong and would throw out and make incorrect all other sections tied onto them. On this map (the Bacon and Graves map) the tier of sections running from 131 on the east to 110 on the west is 225 varas too narrow. I have a Spiller map. The narrow tier of sections on the Bacon and Graves map appears on the second line below on the Spiller map. Etta creek flows into the Colorado river, and it is known as Bull creek. The average width of it as it runs through this block is thirty to forty feet. It is a permanent stream. It was running before this last rain. The creek runs through a good part of the land in this suit, about twenty-five miles. Moccasin creek runs into Bull creek. The width of it is about twenty feet. It never dries in places. There is always water in it at places. North creek flows into the Colorado and is what is known as Bluff creek. Its size is from fifteen to twenty feet. It is a permanent stream in places as it runs through this block. Deep creek flows into the Colorado. The size of it is from forty to fifty feet. It is a permanent stream of water. It runs some fifteen or eighteen miles across the block from the head. There is a creek on block 97 called Ennis creek. It was originally called Sweetwater. It is about sixteen miles long. The average width is about thirty feet. It is a permanent stream. The Elgin field-notes call for lines that would cross all of these streams and none of them would front 950 varas on any of them. Elgin's field-notes call for elm trees. I have examined for elm trees on block 97 and find that there are none on said block, nor have there been any that I can find.

61 I went to Scurry county in April, 1883. Un- the act of 1883 land was worth two dollars per acre. It was being bought for two dollars per acre in April, 1883. Dry land in this country is worth two dollars per acre and watered land is worth three dollars per acre. There is more dry land in block 97 than watered land. I suppose one-fourth of it is watered. The rental value of the land

for grazing purposes is four or five cents per acre. The State leases at four and the railroad leases at five cents per acre. I do not know whether Bacon and Graves have leased any of the lands in controversy.

On cross-examination the witness testified:

I am a practical surveyor. I studied surveying at school, under Professor Collier. I have surveyed all over the district of Scurry, Kent and Garza counties. I said that the J. P. Smith land adjoined block 97 on the east. I have run the lines of Peter Smith's land and block 97, and it is attached to the east boundary line of block 97. The Kirkland and Fields surveys did not lie between block 97 and the J. P. Smith's survey. I understand that they are all the J. P. Smith lands; that is, that the Kirkland and Fields surveys are considered a part of the Peter Smith surveys. The J. P. Smith lands front 950 varas to the section on the river. I have run out those surveys that front on the river. None of them cross the river. Some of them may be in conflict with other surveys, but it is south of the river. I have run some of the surveys south of the Colorado river. I have run 92, 108, three corners of 90, and 106. My object in running these surveys was to locate settlers on them. I forget the names of the parties just now. I ran these surveys some time in 1890. The parties taking up the land carried the chain for me. I remember Carruthers was one of them. He is living on the land. I forget the name of the party on 108. It is not a fact that I concluded the river runs through the surveys because the map so shows, for I have traced the lines on 112, 105, 124 and 104 and found that they cross the river. Mr. Weaver is located on 104. I could not name all the sections which the river runs through. That is all I can remember without looking at the map. I found the river and the several crossings called for by Jack Elgin's field-notes every time. I have never made any surveys for large blocks of land—only surveys for homesteads. My first step, if I was going to
62 make original surveys, would be to establish a monument for a corner that would be permanent and that could be easily found and well identified by reference to the field-notes. If I wanted a block north, I would run north; if south, I would run south, etc. In locating a block of land, I would most certainly locate and establish a corner first. The kind of an instrument that I would use would be Gurley's transit. I would find the true north by getting the variation. I could ascertain the variation by the sun shadows, or by one of the stars in the dipper. The field-notes of Elgin of block 97 were originally at 10 in 1873. The variation that will trace them now is about 9; that is the common course. There is a change in the variation of from three to four minutes annually. I would expect to find Elgin's marks after making a calculation between that time and this. The difference in variation from 1873 to now would be about one degree. Elgin must have had the variation about right. I have done work on all the blocks in my land district. I have found the corners that were called for when there were bearing trees. I found difference in the length of the lines as

called for in the Elgin survey. Elgin's work, as compared with others, was not nearly as correct as the T. & P. survey. The Houston and Great Northern work is much more correct than Elgin's, as I ascertained in Scurry, Kent and Garza counties. I have been doing work on the Houston and Great Northern every year. I began doing it in 1886. Wise corrected a part of this work in 1882, I think, a part of block 1. I found by running the lines on block 2 of the Houston and Great Northern lines, that they are much more accurate than the Elgin survey of block 97. I found eight or ten corners on the H. & G. N. survey, but did not do much work on that survey, only a few sections. I did not find many sections that had exactly 1,900.8 varas, and you might measure a section of land a dozen times and you would not make it exactly to an inch the same number of varas every time. Take the northeast corner of section 215 of block 97, and the northeast corner of section 213, which is two miles from the northeast corner of section 215, and you will find that it is out of place about fifteen varas north and twenty-five varas west. One of these corners I speak of is east, which makes the distance very much greater. In making homestead surveys, if I did not close to a vara when I came around, I would always correct. I did not want any discrepancy. I found that a good many of the section lines of the Elgin survey crossed the river.

63 Under the law, as I understand it, a section can only front 950 varas on the river. I have never seen any elm trees in Scurry county. I have been on Mr. Moore's ranch. I have never seen any elms marked as corners on his place. I have never seen any elms on Deep creek. I have been from the head to the mouth of Bull creek. I do not know of any elm trees on these creeks. I would know an elm tree if I would see it. The law defines a navigable stream as one retaining an average width of thirty feet. Water was flowing in the river before this last rain. It was flowing in Bull creek, one of the tributaries. The water was narrow before this last rain. Bull creek is thirty feet wide after a rain. Of course, in the shoals when it is down it is very narrow. There are deep holes in the stream that would swim a horse. The average width of the channel is thirty feet. There are times when it is low and on the shoals very narrow. I have surveyed lands for a great many settlers in Scurry county.

The State introduced the answers of E. G. GRAVES, one of the defendants, to the seventh and tenth interrogatories in case No. 23, E. M. Bacon and E. G. Graves *vs.* Mooar Brothers, in the district court of Scurry county, as follows:

We did not have enough money to purchase said land. We procured the money through Captain B. L. Crouch, and tender of the money was made to the State treasurer for the purchase of said land.

I do not remember any such understanding between ourselves and the surveyor. I was in Palo Pinto during the time the surveyors were making out the field-notes and knew they were doing so. I do not remember whether I left before they were completed

or not. If so, I went to Big Springs, and was either in Big Springs or on the road during the remainder of the time. Hal Bacon and myself left together with some of the field-notes and Joel McKee left with the balance. About a week elapsed from the time I applied for the field-notes until I received them.

W. A. HOLLOWAY, witness for the State, testified:

I came to Colorado in 1881. I lived in Scurry and Borden counties from 1881 to 1887. I was engaged in the cow business.
64 I had a herd of cattle. They were mostly on Bull creek. I was there in September and October, 1882, and up to and including January, 1883. I stayed on Bull creek from the fall of 1881 to 1887. I was all through that country from the spring of the year until it got too cold to work. I was frequently on block 97. I went on the land once every week through the year. In September and October, 1882, I did not see any surveying parties doing surveying on that block. I was in the town of Snyder about every month. My ranch is eighteen miles from Snyder. I have been from the Double Mountain fork of the Brazos to the Colorado and from here up to the head of Bull creek. I never saw surveyors doing work on the ground.

On cross-examination witness testified:

I did not live on block 97, but right close to the line. I hunted on block 97 as well as the others. I do not mean to say absolutely that no surveyors were on said block. I had some actual surveying done in Scurry county and Judge Looney did it for me. I bought some lands on contract, and Judge Looney traded for them and got them from the Central railway. I never had these lands surveyed. Judge Looney ran out the lines for me. We ran one dividing line and one to a corner, and then ran a line through to the northwest corner. We never ran any lines around the whole block. I think I remember finding the corners in section 25 of block 97. We were just tracing lines from old field-notes. We went to some cottonwoods on Bull creek. Judge Looney got the distance from the field-notes and found the corners. When we got on block 97 we found rock piles and struck the corner. I struck a corner between a school section and another section. I never did see any elm trees in that country. I have seen cottonwoods. Cottonwoods are about all there is to mark. Running north we found a pile of rocks but no stake there.

On redirect examination witness testified:

I bought the land from the State in 1882. When I got to Scurry county, in 1881, there was a ranch on Deep creek. There was an old house that had been a buffalo camp, and beyond Snyder I think there was a store. Webb had a ranch there. Sometimes
65 Bull creek goes dry and there are only holes. I have seen Bull creek stand in holes, and so dry in some places that I could have walked over it without getting my feet wet.

The State introduced the answers of H. M. BERRY to direct interrogatories 5 and 6, as follows:

I know of my own knowledge that Joel McKee approved and signed the field-notes made by me for Bacon and Graves, for he was present and signed the notes as fast as they were turned over to him. I saw him sign the notes, for we were in the same room at the time the work was being adopted. After the field-notes were put on record in the surveyor's office of the Palo Pinto land district, Joel McKee rolled them up in a large package and he went off with them. This is as far as my personal knowledge extends. McKee said he was going to Gordon, Palo Pinto county, Texas, to meet E. G. Graves on the train and turn over the said field-notes to the said Graves. When he returned he said that he (McKee) met Graves at the above-named place, and turned over the field-notes to him, the said Graves.

The State introduced the answers of W. B. WORTHAM to the 1st, 2nd and 3rd cross-interrogatories, as follows:

The lands offered to be paid for by Hon. John Hancock were as follows, to wit: Surveys Nos. 118 to 291, inclusive, block G, Borden and Scurry counties; surveys 1 to 119, inclusive, block M, in Scurry county; surveys 1 to 52, inclusive, block N, in Scurry county; surveys 1 to 117, block B, in Scurry county, and surveys 1 to 135, block G, in Borden and Scurry counties. Copies of tenders on said lands hereto attached, apps. B and C.

The offer was declined by the treasurer on the following grounds, as is shown by the records of the State treasurer's office, to wit: Letters to E. M. Bacon and E. G. Graves, dated May 16th and May 19th, 1883, both stating that the payments were declined for the reason that a part of the surveys offered to be paid for covered sections heretofore surveyed and designated as public free-school lands of the State, the sale of which other than as such free-school lands being forbidden by chapter VII, General Laws of the 18th Legislature.

66 J. T. Brackenridge, president of the 1st National Bank of Austin, was present, and with the Hon. John Hancock, when the offer to pay was made on the 16th day of May, 1883. Whether or not he was present and with Hon. John Hancock on the 19th day of May, 1883, I do not now remember. The money offered to be paid was of large denominations, clean and well preserved, easily counted and verified.

The State introduced the answers of JAMES S. HOGG to all the cross-interrogatories, as follows:

I have stated in my answer to direct interrogatory No. 2 substantially and to the best of my recollection what occurred and was said by myself on the date of the alleged payment. My recollection is that Treasurer Lubbock notified me of the proposed payment some time before and consulted with me about it. I advised him then, as I did in the presence of the parties, that I believed the Bacon

and Graves claim to the land was unjust and illegal, but that a tender of the money and his refusal to accept it gave the parties all the rights which could be conferred by an actual payment. I had understood that land agents had been making "tenders" before, which had been refused by the treasury, and I told Treasurer Lubbock that the acceptance of the money in this case would give them no more rights than the other parties had who had not really paid the money, but instead held his refusal to accept it. I advised him also to issue the receipts for the money paid. I am unable, of course, to give the language used. It may have been to "issue receipts up to the handle." It is quite likely I used some slang in connection with the matter. I don't think the money was paid while I was present. My recollection is that while the parties were present, proposing to tender it, that I advised the treasurer to accept it under the circumstances stated; that Mr. Hamilton and Mr. Maddox left the treasurer's office about the time I did, but the treasurer that evening, or the next day, told me the money was paid and may have asked me the character of the receipts issued. I may have told him the kinds of receipts to issue, which most likely is in the form of the receipt he did issue.

Witness R. J. BRACKENRIDGE, by deposition, testified:

67 Name is R. J. Brackenridge. Residence, Austin, Texas. Occupation, banker. I am cashier of the First National Bank of Austin. I have been such cashier about nine years. J. T. Brackenridge is and was president of the First National bank during and throughout the year 1883. The capital stock of First National Bank of Austin at times enquired about was $75,000, and the notes in circulation at said times, $31,500. I have hereto attached statements of the condition of the bank on the 16th and 19th days of May, 1883, and marked the same respectively, Exhibits A and B.

EXHIBIT A.

MAY 16, 1883.

	Assets.	Liabilities.
Capital stock		$75,000 00
Surplus fund		75,000 00
Profit and loss		26,556 39
Interest account		543 85
Exchange account		276 00
Circulation		31,500 00
Individual deposits		387,741 71
Certificates of deposit		2,303 00
Cashier's checks		12,159 00
U. S. bonds to secure circulation	$35,000 00	
U. S. treasurer 5 per cent. fund	1,750 00	
Other stocks and bonds	11,131 85	
Bills discounted	544,418 33	
National City bank	6,744 13	

	Assets.	Liabilities.
Bank of Commerce, St. Louis	$2,541 66	
Louisiana National bank	978 20	
National bank, San Antonio	.....	$43,429 91
Texas B'k'g and Ins. Co.	882 67	
First National, Galveston	.....	22,421 60
City, Houston	6,332 80	
Waco National bank	.....	15 45
H. Runge	.....	218 31
Raymond & Co.	.....	3,007 44
State National bank	8,662 20	
City National bank	1,334 37	
Other real estate	.....	28,102 52
Expense account	31 85	
Cash currency	88,642 12	
	$708,274 18	$708,274 18

Major E. M. BACON, one of the defendants, again testified for the State:

I was present at Austin on the 16th and 19th days of May, 1883, when the tender of the money was made. I was present
68 when the tender was actually made to the treasurer. The following parties were present: Judge Hancock, Major J. T. Brackenridge, Mr. Edwin Hancock, son of Judge Hancock, Mr. B. L. Crouch and myself. I do not know where Mr. Crouch got the money. I was not present at the bank when the money was taken out. I met the parties in Judge Hancock's office. Major Brackenridge joined us as we went up the street. Major Brackenridge was president of the First National bank. I do not know what was done with the money that was refused. I did not go to the bank. I do not know whether Brackenridge stopped at the bank on returning. I do not know how much money was in the grip. I did not count it. I was present at the delivery of the tender to the treasurer. It was nice-looking money, fresh and crisp. I do not know where it came from. I do not know what arrangement was made between Mr. Crouch and Mr. Brackenridge. Brackenridge went to the treasury with us. I do not know whether or not he kept a pretty keen eye on the grip. He went along with us by invitation. He came back part of the way, if not all the way. I do not know whether Major Brackenridge was armed or not. I did not pay attention to the counting of the money. Major Brackenridge stayed at the treasury while the money was being counted. Mr. Wortham counted to a certain sum and said: "It is no use counting further. I have instructions to refuse it and I am perfectly certain that the money is all there." I do not know what Brackenridge was doing. Perhaps he was in the hall at the time. The office of the treasurer at that time was in the temporary capitol and the place where the money was delivered was hardly big enough for two or three people to get through at once. I think Mr. Brack-

enridge was with us when we went down the street. My recollection is that Judge Hancock passed the bank deliberately. I don't know whether Brackenridge went as far as the bank on returning from the treasurer's office. Judge Hancock had the money the last I saw of it, and that was in his office and that was the last I saw of it. I do not remember whether I left Mr. Crouch with Judge Hancock or not. Nobody told me where they got the money from. The money was in Crouch's grip. Mr. King was a cattleman and friend of mine. King agreed to loan me five or six thousand dollars if I wanted, and said if I was going into the business of purchasing this land he would loan me the
69 amount mentioned. The only agreement or arrangement that I had to raise money from December 1, 1882, to February, 1883, was with Mr. King. I made no arrangement with Mr. King or anybody for any money to pay for the land until February, 1883. Then I made arrangements with Mr. B. L. Crouch. The only arrangement I made with Mr. King was for the five or six thousand dollars and no more. I had no arrangements with him, nor with anybody, except the one mentioned, until February, 1883. Five or six thousand dollars is all the money I had made arrangements for when I went into the purchase of this land. I had no promise or understanding with anybody else at all for any money, Financially, Mr. Graves nor myself was able to pay for the land nor to pay for the filing, but had to make arrangements to get the money to pay for the filing. We were not financially able to pay the purchase price of the land at the time we made the file nor at any time afterwards. I feld I could raise that amount of money. I was satisfied I could. Financially, Mr. Graves and myself were not able to meet the payment.

The State introduced the answer of W. L. McGAUGHEY to direct interrogatory 2 as follows:

There are 956 surveys in block 97, situated in the counties of Mitchell, Scurry, Borden, Kent, Garza, Fisher and Howard. There are, of the 956 surveys mentioned above, according to the maps of Borden and Scurry counties, 604 surveys of said block in said county. Twenty-four surveys of said 604 surveys appear to be partly in Garza and Kent counties. There are 117 surveys in block B, Borden and Scurry counties. There are 291 surveys in block G and 119 surveys in block N. The field-notes of surveys 26 to 32, inclusive, in block M, are not on file in this office..

J. W. NUNN, witness for the State, testified:

I live in Colorado City. I have lived in Mitchell county five or six years. I moved to Scurry county in the fall of 1877, and lived there five or six years. The Colorado river, as it runs through the southern portion of block 97, averages in width about 100 feet. It is one of the permanent rivers of the State. Since 1877 I have never known the Colorado river to go dry.

above-mentioned survey, as found recorded in my office, in Book P, page 1, records for Bacon and Graves, in Scurry county.

Given under my hand this 16th December, 1891.

W. METCALF,
Surveyor Palo Pinto County, Texas.

Variation, 9° east; scale, 4,000 varas per inch.

THE STATE OF TEXAS, PALO PINTO LAND DISTRICT. } Survey No. 2, Block No. B.

Field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, A. D. 73 1881, situated in Scurry county, on the waters of the Colorado river, about — miles from ——, and known as survey No. 2, block B: Beginning at a stake southeast of No. 1; thence north 1,900 varas to a stake; thence east 1,900 varas to a stake; thence south 1,900 varas to a stake; thence west 1,900 varas to the place of beginning. Bearings marked ⧢. Surveyed January 17, 1883.

J. H. MILLER,
J. B. PIERCE,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-notes, and find them correct, and that they are recorded in my office in Book P, page 2.

JOEL McKEE,
Surveyor of Palo Pinto Land District.

I, W. Metcalf, surveyor of Palo Pinto county, do hereby certify that the above is a true and correct copy of the field-notes of the above-mentioned survey, as found recorded in my office in Book P, page 1, records for Bacon and Graves in Scurry county.

Given under my hand this 16th December, 1891.

W. METCALF,
Surveyor Palo Pinto County, Texas.

Variation, 9.21 east; scale, 4,000 varas per inch.

THE STATE OF TEXAS, }
PALO PINTO LAND DISTRICT. } Survey No. 1, Block No. G.

Field-notes of a survey of 640 acres of land, made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled "An act to provide for the
74 sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14th, 1879, and amendments thereto, approved March 11, A. D., 1881.

Situated in Scurry county, on the waters of Gubbits Etta creek, a tributary of the —— river, about — miles from —— and known as survey No. 1, block No. G. Beginning at a stake the northeast corner of survey No. 117, block B, made by virtue of same application as this survey; thence west 1,900 varas to a stake and mound; thence north 1,900 varas to a stake; thence east 1,900 varas to a stake; thence south 1,900 varas to the place of beginning. Bearings marked $\overset{N}{\equiv}$. Surveyed January 19, 1883.

JERRY PERKINS,
JAMES SELF,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor Palo Pinto Land District.

I, —— ——, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office in Book P, page 118.

JOEL McKEE,
Surveyor of Palo Pinto Land District.

March 14, 1883.

File 54951, Bexar scrip, Bacon and Graves, field-notes. Filed March 17, 1883.

COM'R GENERAL LAND OFFICE,
AUSTIN, TEXAS, *December 17th*, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the above and fore-
75 going is a true and correct copy of the original, with all endorsements made thereon, which original is now on file in this office.

In testimony whereof I hereunto set my hand and affix
[SEAL.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner General Land Office.

Variation, 9° 21′ E.; scale, 4,000 varas per inch.

THE STATE OF TEXAS, } Survey No. 1, Block No. M.
PALO PINTO LAND DISTRICT. }

Field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, A. D. 1881, situated in Scurry county, on the waters of Deep creek, a tributary of the Colorado river, about — miles from ——, and known as survey No. 1, block No. M.

Beginning at a stake and mound, the northeast corner of survey No. 291, block G; thence west 1,900 varas, a stake and mound; thence north 1,900 varas, a stake and mound; thence east 1,900 varas, a stake and mound; thence south 1,900 varas to the place of beginning. Bearings marked ⩥. Surveyed —— —, 1883.

ANDY BURNS,
ED. WAGNER,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-
76 notes and find them correct, and that they are recorded in my office in Book P, page 409.

JOEL McKEE,
Surveyor of Palo Pinto Land District.

March 15th, 1883.

File 50350. Bex. scrip. Bacon and Graves' field-notes, 640 acres. Filed March 20, 1883.

D. N. ROBINSON,
Chief Clerk.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Dec.* 17, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a true and correct copy of the original field-notes of survey No. 1, block No. M, made for Bacon and Graves, with all endorsements thereon, said original is now on file in this office.

In testimony whereof, I hereunto set my hand and affix [SEAL.] the impress of the seal of said office, the date last above written.

W. L. McGAUGHEY,
Commissioner General Land Office.

B. CLAYTON, witness for the State, testified:

I live in Scurry county. The Colorado river is one hundred and fifty yards wide in Scurry county. I have lived there for ten or eleven years. The water always runs in the river. Sometimes there is an undercurrent under the sand between holes in the river. Said river is one of the permanent rivers of the State and drains this whole section of country.

On cross-examination witness testified:

I meant that the river was one hundred and fifty yards wide from bank to bank when I said one hundred and fifty yards wide. The channel is very seldom full of water. I could not tell the average width of the water the year round, because sometimes it is very narrow, and sometimes dry in places and very wide in other places. Sometimes it is one hundred yards wide in places.
77 Sometimes the water runs very low over the shoals. I cannot say what would be the average width of the water. During a drouth I do not think there would be enough water in the river to make the width of the river average over twenty feet.

On redirect examination the witness testified:

I cannot tell the average width of the stream. It stands in holes at times. Sometimes there is a good deal of water and sometimes not so much. I have never known the river to overflow its banks. The soil in the bed of the river is mostly sand. The river is not generally full to its banks in the winter. I do not know that I have ever seen it full to its banks. In dry times, if the river stands in holes, there is an undercurrent under the sand. I have dug down about one foot and a half in the sand and found water there when there appeared to be none on the surface in dry times. I have dug in the sand when the water was low to get fresh water, and have always got it.

On the trial of the above numbered and entitled cause the defendants adduced the following testimony:

1. The defendants offered in evidence the agreement signed by C. A. Culberson, attorney general; T. D. Cobbs, attorney for H. &

T. C. Railway Company, and C. C. Gibbs, Hancock, Shelley & Hancock, R. H. Looney, attorneys for E. M. Bacon and E. G. Graves, which agreement is her-inabove fully copied and set out.

2. J. J. MEYER, by deposition, testified as follows:

I am county surveyor of Shackelford county, State of Texas. I am custodian of the surveyor's records of Shackelford county. At present there are no counties attached to Shackelford county for any purpose, nor has there been since I have been surveyor. There are no records of any surveys of lands in Borden and Scurry counties in my office.

3. The witness, W. B. WORTHAM, by deposition, testified:

My name is W. B. Wortham, I reside in Austin, Texas, and my official position is now State treasurer of Texas. I was chief
78 clerk of the Texas State treasury on the 16th and 19th days of May, 1883. I know E. M. Bacon, E. G. Graves and Hon. John Hancock. On the 16th and 19th days of May, 1883, Hon. John Hancock, in company with E. M. Bacon and E. G. Graves did offer to pay into the State treasury for the said Bacon and Graves the purchase-money for certain lands, known as the Bacon and Graves locations in Scurry and adjoining counties, lying in block 97 of the H. & T. C. R. R. surveys. The payment offered was on the following lands, to wit: Surveys Nos. 118 to 291, inclusive, block G, in Borden and Scurry counties, Surveys Nos. 1 to 119, inclusive, block M, in Scurry county. Surveys Nos. 1 to 52, inclusive, block N, in Scurry county. Surveys Nos. 1 to 117, inclusive, block B, Scurry county, and surveys 1 to 135, inclusive, block G, Borden and Scurry counties.

On the 16th day of May, 1883, the Hon. John Hancock, as attorney for Bacon and Graves, tendered to me as acting State treasurer, the sum of eighty thousand six hundred and forty dollars ($80,640), being for payment on certain lands known as the Bacon and Graves locations, at fifty cents per acre. This sum was handed to me as acting treasurer, in the absence of Hon. F. R. Lubbock, treasurer, which sum was by me counted and found to be the amount offered in payment for said parties on said lands.

On the 19th day of May, 1883, the Hon. John Hancock, as attorney, made another and second tender of one hundred and four thousand six hundred and forty dollars (104,640) on other locations by Bacon and Graves, to the State treasurer, which was handed to me as chief clerk for examination and verification, and which was found to be the amount offered to be paid at the rate of fifty cents per acre.

The money was offered to be paid in the currency of the United States in large bills, and was handed me by the Hon. John Hancock. When the tender of May 16th, 1883, was made I was, in the absence of the treasurer, acting State treasurer, and when the tender of May 19th, 1883, was made I acted as chief clerk to the treasurer, and received and verified the money, and reported to the

Hon. F. R. Lubbock, treasurer, that the money offered to be paid was found to be correct, whereupon a written acknowledgment of
of tender was executed and signed by the treasurer and de-
79 livered to the Hon. John Hancock for Bacon and Graves, as had been done by myself as acting treasurer on May 16th, 1883.

I do not know that I had special instructions concerning the payment, but knowing that it was the desire of the treasurer that such payments should be declined, I so informed those offering to pay; that is, that I would not receive the money and issue receipts therefor, and upon a demand that I furnish them with the reasons for declining to receive the payment, I did so, as before stated, in writing, the two instruments, as hereinafter stated, being dated the first of May, 1883, and the second on May 19th, 1883.

There was a subsequent payment made on the E. M. Bacon and the E. G. Graves locations. This payment was received by the treasurer in the year 1891. The treasurer was advised by the attorney general to receive and receipt for this payment.

This subsequent payment of one hundred and forty-nine thousand one hundred and twenty dollars ($149,120) was paid to the treasurer in my presence on the 3d day of January, 1891, on the following lands:

Two hundred and ninety-one sections of land, 640 acres each, being the surveys numbered from 1 to 291, both inclusive, in block G, Borden and Scurry counties; also 58 sections of 640 acres each, being surveys numbered from 1 to 58, both inclusive, in block M in Borden and Scurry counties. Also 117 sections of 640 acres each, being surveys numbered from 1 to 117, both inclusive, in block B in Scurry county. The money was deposited to the funds as is provided by law, mingled with the other moneys of the State and paid out in accordance with law on the comptroller's warrants and orders of transfer.

The treasurer issued receipts for this money, issuing a separate receipt for each section (640 acres) of land, as is the custom and rule of this office in payments of like character. A copy of said receipts is hereto attached, with my name written thereon for identification, and marked Appendix "A." In all there were 446 receipts issued.

On cross-examination the witness testified:

The lands offered to be paid for by Hon. John Hancock were as follows, to-wit:
80 Surveys Nos. 118 to 291, inclusive, block G, Borden and Scurry counties; surveys 1 to 119, inclusive, block M, in Scurry county; surveys 1 to 52, inclusive, block N, in Scurry county; surveys 1 to 117, block B, in Scurry county, and surveys 1 to 135, block G, in Borden and Scurry counties, copies of tenders on said lands hereto attached, Appendixes B and C.

The offer was declined by the treasurer upon the following grounds, as is shown by the records of the State treasurer's office, to-wit: Letters to E. M. Bacon and E. G. Graves, dated May 16th

and May 19th, 1883, both stating that the payments were declined, for the reason that a part of the surveys offered to be paid for covered sections heretofore surveyed and designated as public free-school lands of the State, the sale of which, other than as such free-school lands, being forbidden by chapter VII, general laws of the 18th legislature.

J. T. Brackenridge, president of the First National Bank of Austin, was present, and with the Hon. John Hancock, when the offer to pay was made, on the 16th day of May, 1883. Whether or not he was present and with the Hon. John Hancock on the 19th day of May, 1883, I do not now remember. The money offered to be paid was of large denomination, clean and well preserved, and easily counted and verified.

On rebuttal the witness testified:

I did count a portion or all of the money, and did thereby satisfy myself that the money was then and there offered and exhibited, and informed the parties that it would not be received, that being the decision of the department before arrived at.

APPENDIX A.

No. 10077. TREASURER'S OFFICE,
AUSTIN, TEXAS, *January 3rd*, 1891.

Received of C. C. Gibbs, trustee, on account of E. M. Bacon and Everett G. Graves, the sum of three hundred and twenty dollars, the same being payment in full on 640 acres unappropriated public lands in Borden and Scurry counties, under "An act to pro-
81 vide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," survey 1, block G.

F. R. LUBBOCK, *Treasurer.*

APPENDIX B.

AUSTIN, TEXAS, *May 16th*, 1883.

To the honorable treasurer of the State.

SIR: We, Elbert M. Bacon and Everett G. Graves, offer to pay the amount of money due the State on our purchase of one hundred and seventeen (117) sections of 640 acres each, being numbered from 1 to 117, both inclusive, being block B, situated in Scurry county, and State of Texas, as per field-notes returned to the land office, as shown by the commissioner's certificate, herewith shown you. Number of acres, 74,880, at 50 cents per acre, $37,440. Also we offer to pay the amount of money due the State on our purchase of one hundred and thirty-five (135) sections of 640 acres each, being numbered from 1 to 135, both inclusive, and being in block G, situated in Borden and Scurry counties, in said State, as per field-notes returned to the land office, as shown by the commissioner's

certificate herewith shown you. Number of acres, 86,400, at 50 cents per acre, $43,200.

Respectfully,

ELBERT M. BACON.
EVERETT G. GRAVES.

TREASURER'S OFFICE, AUSTIN, TEXAS, *Oct.* 27, 1891.

I hereby certify, that the foregoing is a true and correct copy of the original document, signed by Elbert M. Bacon and Everett G. Graves, now on file in this office.

In testimony whereof I hereto sign my name and affix
[SEAL.] the official impress of the seal of office the date last above written.

W. B. WORTHAM, *Treasurer.*

APPENDIX C.

AUSTIN, TEXAS, *May* 19, 1883.

To the hon. treasurer of the State.

SIR: We, Elbert M. Bacon and Everett G. Graves, offer to pay the amount of money due the State on our purchase of one
82 hundred and fifty-six (156) sections of 640 acres each, being numbered from 118 to 291, both inclusive, and being in block G, situated in Borden and Scurry counties and State of Texas, as per field-notes returned to the land office, as shown by the commissioner's certificate herewith shown you. No. of acres, 99,840; at 50 cents per acre, $49,920. Also, we offer to pay the amount of money due the State on our purchase of one hundred and nineteen (119) sections of 640 acres each, being block M, situated in Scurry county, in said State, as per field-notes returned to the land office, as shown by the commissioner's certificate herewith shown you. No. of acres, 76,160; at 50 cents per acre, $38,080. Also we offer to pay the amount of money due the State on our purchase of fifty-two (52) sections of 640 acres each, being numbered from 1 to 52, both inclusive, and being block N, situated in Scurry county, in said State, as per field-notes returned to the land office, as shown by the commissioner's certificate herewith shown you. No. of acres, 33,280; at 50 cents per acre, $16,640.

Respectfully,

ELBERT M. BACON.
EVERETT G. GRAVES.

TREASURER'S OFFICE, AUSTIN, TEXAS, *Oct.* 27, 1891.

I hereby certify that the above and foregoing is a true and correct copy of the original document, now on file in this office.

In testimony whereof I hereto sign my name and affix
[SEAL.] the *the* official impress of the seal at office the date last above written.

W. B. WORTHAM, *Treasurer.*

4. F. R. LUBBOCK, by deposition, testified:

My name is F. R. Lubbock, and on the 16th and 19th days of May, 1883, I was State treasurer of Texas.

On the 16th and 19th days of May, 1883, E. M. Bacon and E. G. Graves signified their purpose or intention to pay the purchase-money for the lands named by tendering the sums necessary to make such payments. Two tenders of payment were made, the first
83 $80,640 on May 16, 1883, during my absence, which appears of record in the treasury department. I, therefore, do not know of my own knowledge the particulars as indicated in interrogatory.

I was in the office on the 19th day of May, 1883, when the second tender, $104,640, was made by Hon. John Hancock, attorney for E. M. Bacon and E. G. Graves. The chief clerk of the treasury, W. B. Wortham, examined the money tendered, and upon his statement that amounts sufficient to cover the proposed tender were correct, I gave to the said E. M. Bacon and E. G. Graves a certificate in writing to that effect, a copy of which is on the records of the treasury department. The amounts tendered each time are shown also by the treasury's records.

I do not remember who was present, the transaction being conducted by the chief clerk.

On the 3rd day of January, 1891, Mr. Frank Hamilton, as agent for E. M. Bacon and E. G. Graves, and others associated with them, tendered to me the sum of $149,120.00, to cover the payments due on certain lands situated in Scurry and Borden counties which was received and receipted for, in accordance with the advice of the then attorney general of Texas, Hon. J. S. Hogg.

I was not in the treasury department on the 16th day of May, 1883. I was in Galveston on that day. The chief clerk of the treasury had charge of the office and acted in my stead during my absence. Do not remember to have given him special instructions concerning what course to pursue in case of the tender named, as he was entirely familiar with the matter and knew my wishes in regard thereto.

As before stated, I was absent on the 16th day of May, 1883, but was present, or in the office, on the 19th day of May, 1883, when Hon. John Hancock made a tender, as attorney for E. M. Bacon and E. G. Graves, on certain lands in Borden and Scurry counties. The money was examined by the chief clerk, W. B. Wortham, and upon his statement that the amount necessary to make the proposed payment was correct, I delivered to the said Hon. John Hancock, for Bacon and Graves, an instrument in writing, declining to receive and receipt for the said money, giving therein my reasons for so doing, a copy of said instrument being now in the treasurer's office, which I do not now have charge of.

84 My reasons for refusing to receive the payments tendered on the 16th and 19th days of May, 1883, are set forth in the instrument of writing given then.

My reason for receiving the payment tendered on the 3d of Jan-

uary, 1891, is that the then attorney general of Texas, Hon. J. S. Hogg, advised me to do so.

When Mr. Frank Hamilton brought the money in and indicated his intention or desire to make the payments I did send for the Hon. J. S. Hogg, attorney general, who came into my office and advised me to receive the money. (I had also consulted him before in regard to what course I, as State treasurer, should pursue in case the tender was made.)

Upon some difference of opinion between Mr. Hamilton and I, as to what kind of receipt I should execute for the money, the attorney general was sent for the second time, and then advised me to execute the kind of receipt as indicated by Mr. Hamilton—that being a receipt for each section of land covered by the payments.

The amount paid was $149,120, and was paid on lands as indicated in the receipts issued and delivered, and by the records of the State treasurer's office one-half the money was deposited to the credit of the public fund, the other half to the payment of the bonded debt.

The chief clerk had charge of the moneys of the office, and a few days thereafter I ceased to be State treasurer, therefore cannot answer the other questions.

5. The witness, W. L. McGAUGHEY, by deposition, testified:

I am commissioner of the general land office of the State of Texas. There are field-notes in the general land office of lands in Borden and Scurry counties known as block 97, H. & T. C. R. R. Co., and of blocks B, M and G in name of Bacon and Graves. There are 956 surveys in block 97, situated in the counties of Mitchell, Scurry, Borden, Kent, Garza and Fisher. There are of the 956 surveys mentioned above, according to the maps of Borden and Scurry counties, 604 of said surveys of said block in said counties, 24 surveys out of said 604 surveys appear to be partly in Garza and Kent counties. There are 117 surveys in block B, Borden and Scurry
85 counties. There are 291 surveys in block G, and 119 surveys in block M. The field-notes to surveys 26 to 32, inclusive, in block M, are not on file in this office. The form of certificate immediately above the signature of the deputy surveyor in the several field-notes of block 97 on file in the land office are similar in form. J. E. Elgin, deputy surveyor of Jack land district, appears from the field-notes of the surveys in block 97 to have signed the said field-notes in said block. H. M. Berry and E. A. Williams appear to have signed the field-notes of the surveys in blocks B, M and G, as deputy surveyors of Palo Pinto land district. The form of certificate immediately above the signature of the deputy surveyor in the several field-notes of blocks B, M and G, on file in the general land office. I attach hereto a certified copy of the form of the deputy surveyor's certificate attached to each of the field-notes in said block marked Exhibit "A." They are similar in every respect, except that the name of the deputy surveyor is not the same in all of them. I attach hereto certified copy of the form of certificate signed by H.

M. Berry, deputy surveyor, marked Exhibit "B," and a certified copy of the form of certificate signed by E. A. Williams, deputy surveyor, marked Exhibit "C." It appears from the maps in use in this office that the surveys in blocks B, G and M, cover land that is covered by surveys in block 97. I attach hereto certified copy of the sketch filed in this office with the field-notes of surveys in block 97 marked Exhibit "D," also a certified copy of the sketch filed with the field-notes of the surveyors in blocks B, G and M, marked Exhibit "E."

On cross-examination the witness testified:

The certificates of E. A. Williams and H. M. Berry state that the surveys were actually made in the field, and it is true that it is a physical impossibility for those two surveyors to have surveyed the land they claim to have surveyed within the time they are alleged to have been made.

EXHIBIT A.

I, John E. Elgin, deputy surveyor Jack district, do hereby certify that the foregoing survey was made according to law, and that the limits, boundaries and corners, with the marks, natural
86 and artificial, are truly described in the foregoing plat and field-notes.

JOHN E. ELGIN,
Deputy Surveyor Jack District.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Dec.* 14, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the above is a true and correct copy of the form of the certificate of the deputy surveyor of Jack district, as appears on all of the field-notes of block 97 in Borden and Scurry counties, made for the Houston & Texas Central Railway Company, now on file in this office.

In testimony whereof I hereunto set my hand and affix
[SEAL.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner General Land Office.

EXHIBIT B.

I, H. M. Berry, deputy surveyor of the Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of the Palo Pinto Land District.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *December 14th*, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the above is a true and correct copy of the form of certificate of the deputy surveyor of Palo Pinto land district, as appears on the field-notes made for Bacon and Graves in Borden and Scurry counties, now on file in my office.

In testimony whereof, I hereunto set my hand and affix [SEAL.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner of the General Land Office.

87 EXHIBIT C.

I, E. A. Williams, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

E. A. WILLIAMS,
Deputy Surveyor of the Palo Pinto Land District.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *D-ce.* 14, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the above is a true and correct copy of the form of the certificate of the deputy surveyor of Palo Pinto land district, as appears on field-notes made for Bacon and Graves in Borden and Scurry counties, now on file in this office.

In testimony whereof I hereunto set my hand and affix [SEAL.] the impress of the seal of said office, the date last above written.

W. L. McGAUGHEY,
Commissioner of the General Land Office.

C. W. PRESSLER, by deposition, testified:

My name is C. W. Pressler, age 68 years, and residence, Austin, Travis county, Texas. I have resided at Austin continuously about 40 years. Am now an assistant draughtsman in the general land office. I have had experience in surveying. I am a surveyor by profession. I have been deputy surveyor of the Travis land district and have been a draughtsman in the general land office 33 or 34 years. About 28 years of that time I was chief draughtsman. The Palo Pinto land district was created April 29, 1874. It embraced Palo Pinto, Stephens, Shackelford, Jones and Taylor counties, and the territories beginning at the northwest corner of Jones county, thence west to the 26th degree of longitude, thence south to the Pecos river to Horsehead crossing, thence north to the southwest

corner of Taylor county. This district was so constituted from April 29, 1874, to April 2, 1883.

88 As soon as the Palo Pinto land district was properly organized the surveyor of said district was the recognized surveyor of Borden and Scurry counties during the period mentioned. No land district except that of Palo Pinto was recognized by the general land office as having jurisdiction in said county. The Palo Pinto land district was so recognized because the general land office was furnished with the evidence that the surveyor of said district had complied with the law which created said district. He received the records of all surveys in the territory embraced in said district, from Jack land district, April 1, 1875, and from Bexar land district November 11, 1874. There is not now nor was there ever any evidence in the land office that the records of surveys in Borden and Scurry counties were obtained by the surveyor of Shackelford county. There are not now in the land office any field-notes of surveys in Scurry and Borden counties made through Shackelford land district.

On cross-examination the witness testified:

I attach hereto a map or sketch marked to show the situation of the counties of Borden, Scurry, Howard, Kent and Fisher in July, 1873, and mark the same Exhibit "A." The attorney general did call my attention to the act of August 31, 1876, attaching the counties of Fisher, Scurry, Borden and Howard to Shackelford county for surveying purposes, but I had not forgotten said act. I paid no attention to it because Shackelford land district was never organized as created by said act and was never recognized by the general land office. I therefore did not mention it nor delineate it on the map made by me for the use of the attorney general. The act of August 18, 1856, and amended act of February 12, 1858, created Young land district, but it was not organized until 1860.

The witness JOEL MCKEE, by deposition, on direct examination, testified:

I was the district surveyor of Palo Pinto land district in 1882 and 1883.

I was elected at the general election in November, 1882, and qualified soon thereafter. Held the office until the next general election in November, 1884, making my term of office two years.

89 I am a practical surveyor. I did appoint one E. A. Williams and one H. M. Berry as my deputy surveyors during my term of office. E. A. Williams was appointed the 21st of November, 1883, and H. M. Berry on the 23d of December, 1882. They both did work for me as my deputy surveyors.

I am acquainted with E. M. Bacon and E. G. Graves, and was in December, 1882. They filed in my office written applications under the act of July 14, 1879, and amendments thereto, to have lands in Scurry and Borden counties surveyed. Said land is covered by surveys for the H. & T. C. R'y Co., known as block No. 97.

The applications of Bacon and Graves were filed in my office (the surveyor's office of the Palo Pinto land district) and there recorded. Surveying was done by E. A. Williams and H. M. Berry. E. A. Williams and H. M. Berry were both my deputies, and were authorized to do the work purporting to have been done by them by the field-notes now on file in the general land office at Austin for Bacon and Graves. I examined all the notes and found them to be correct before signing same, and approved them and recorded them in my office. These field-notes, I think, correctly described the land. The field-notes were examined and approved by me on the dates from January 17th to 23d, inclusive, but some few, I do not now remember how many, were mislaid in the office, and were not signed until in March, 1883. The field-notes described said lands by 640 acres tracts. The field-notes are correct, and I think a competent surveyor could today go on the ground and ascertain with certainty the particular 640-acre tract described by each field-note. Some of the field-notes have natural and artificial objects by which the land could be found and identified on the ground.

I never saw any field books used by either E. A. Williams or H. M. Berry. It would be impossible for any surveyor to make correct notes under the application of Bacon and Graves without having done more or less surveying on the ground.

E. A. WILLIAMS, on direct examination, by deposition, testified:

Yes, I am acquainted with Mr. Bacon and Mr. Graves. My business in 1882 and 1883, land surveying and architect. I followed land surveying strictly at Sweetwater, Texas. Fort Sill is my present post office. During the years 1882 and 1883 I was deputy sur-
90 veyor of the Palo Pinto land district. I done a great deal of work in Scurry and Borden counties, and did work in block 97, H. & T. C. R'y Co. Do not remember for whom I did surveying, I did work for so many. Not direct for Bacon and Graves. Their field-notes were adopted or made out from my field book and the original H. & T. C. record.

Joel McKee was district surveyor the latter part of 1882 and for the year 1883. H. M. Berry was one of his deputies. Joel McKee appointed me his deputy. I did; yes—yes, I remember preparing field-notes for quite a lot for Bacon and Graves in town of Palo Pinto, Texas, and returned them to the district surveyor. I know that the district surveyor had quite a lot of field-notes for Bacon and Graves, and he told me that they had been approved and signed. I gave them to the district surveyor. Yes, I prepared field-notes under the fifty-cent act in block 97. Yes, as I did on block 97; I had my field book at hand and the original H. & T. C. record; I knew the survey to be correct, or nearly so, by making myself familiar with the said block 97. Yes, I had a field book containing data of all the work done by me in block 97. I had field-notes. Yes, I had a field book and notes; work done on the ground. Yes, I think so, I do not remember of correcting but one or two errors in the original survey. I found the original H. & T. C. survey,

block 97, correct as nearly as any other work in Texas. Yes, I run lines of block 97, interior section lines therein. I found some corners with the bearing trees and natural objects. The field-notes for block 97 and the field-notes for Bacon and Graves both divided the land into 640-acre tracts. They were made and coincided precisely the same, as well as I remember. A competent surveyor could, I think, take the field-notes made for Bacon and Graves and go on the ground and identify each tract of 640 acres with certainty.

On cross-examination the witness testified:

No, no. I know that I or any competent surveyor could identify the land in question. Do not remember the particular tracts. No one.

The witness H. M. BERRY, by deposition, testified:

Surveying and teaching. During the latter part of 1882 and first part of 1883 I was engaged in the land-surveying busi-
91 ness as deputy surveyor. I resided at Mineral Wells, Palo Pinto county, Texas, in 1882 and 1883; my family is there yet. I claim to be a practical surveyor, and have been following the business principally for twenty-one years.

I was deputy surveyor of Palo Pinto land district, Texas, during the latter part of December, 1882 and 1883, under Joel McKee, district surveyor of Palo Pinto land district. I was appointed deputy about December 17th, 1882. My bond was approved in the early part of 1883. I did surveying in Borden and Scurry counties in the latter part of 1882, on what was known as block 97, H. & T. C. R'y Co. I done work in Scurry county prior to Joel McKee's term of office on the southern and eastern boundary of block 97. I worked with H. M. Henderson, who said he was deputy surveyor under D. L. Cunningham, district surveyor, at that time, of Palo Pinto land district. We were establishing the eastern boundary of said block 97, in order to locate the vacancy between said block 97 and the H. & G. N. R'y Co. block No. 3, and also the H. & T. C. block No. 2. To do this, we run lines out in block 97 wherever witness trees were called for, in order to definitely locate the said eastern boundary. We started at the southwest corner of section No. 84, block No. 97, which was well defined by a rock pile and witness tree. We then ran east and found the southwest corner of section 82 in same block. It was defined by witness tree, which we found. We then ran north with the east line of No. 97 until we came to the west line of H. & T. C. R'y Co. block No. 2 and found all the established corners that were called for in block 97 for several miles from said line. I afterwards worked with my own outfit on block 97 in Scurry and Borden counties.

I am not positive who the work above described was done for, but my recollection is that Mr. Henderson told me it was done for Peter Smith of Fort Worth. I did not do any surveying on the ground for E. M. Bacon and E. G. Graves. I only adopted for them work that had already been done.

Joel McKee was district surveyor for the Palo Pinto land district in the latter part of 1882 and the first part of 1883. E. A. Williams and myself are all the names I remember positively; he had other deputies who done work in Andrews and Gaines counties, but I do not remember who they all were. I believe J. L. and Joe
92 Cunningham and L. Taylor worked for Joel McKee at the time above referred to. I was appointed deputy about December 17, 1882; my bond was approved in the early part of 1883; I was appointed by Joel McKee, district surveyor. I applied to him for the place, and gave him a petition signed by a number of the citizens of Palo Pinto county. I done surveying for Joel KcKee until the close of his term. I did return field-notes made by me until the close of my term of office as deputy. I did return field-notes made for Bacon and Graves to Joel McKee as district surveyor, covering lands in Scurry and Borden counties.

I did not do any work on the ground in Borden and Scurry counties in the early part of 1883 under Joel McKee. I had worked in these counties prior to his term of office. I adopted the field-notes from the records in the surveyor's office of the Palo Pinto land district on block No. 97, and returned said notes to Joel McKee, district surveyor, or I adopted the field-notes for Bacon and Graves for each 640 acres survey from the records of Palo Pinto land district and from my own knowledge of the correctness of said work as recorded, which knowledge I obtained by actual work on the ground in September and October, 1882. I know of my own knowledge that Joel McKee signed and approved the field-notes made by me for Bacon and Graves as fast as they were turned over to him. I saw him sign the notes for me. We were in the same room at the time the work was being adopted.

After the field-notes were put on record in the surveyor's office of the Palo Pinto land district, Joel McKee rolled them up in large packages and he went off with them. This is as far as my personal knowledge extends. McKee said he was going to Gordon, Palo Pinto county, Texas, to meet E. G. Graves on the train and turn over the said notes to the said Graves. When McKee returned he said that he (McKee) met Graves at the above-named place and turned over the said field-notes to him, the said Graves.

I did do work in different counties under said act. The surveying I did was to establish the eastern boundary of the said block, and not for Bacon and Graves. The field-notes that I adopted in block 97 for Bacon and Graves was made under the laws of 1879, and the amendatory act of March 11th, 1881. I did not do
93 any surveying on the ground for Bacon and Graves, as before stated, I only adopted the field-notes from the records of the Palo Pinto land district, as I had been on the ground and traced lines on block 97, and had become familiar with many of the original lines and corners of these surveys, and that I was satisfied that the work had been done on the ground by the original surveyor, and that I believed the work to be practically correct. I did not have any note book. Mr. Henderson had notes furnished him by D. L. Cunningham, the district surveyor, for block 97, when we were

on the ground together. I also had notes of block No. 97 when I was there myself. We found the corners as called for in the notes. The information I had was the field-notes just referred to, and we found the corners as called for in said notes to block No. 97.

I did not keep my field book. I thought the original field-notes sufficient, and was governed by them in adopting said notes for Bacon and Graves. Mr. Henderson made notes on the vacancy and placed them on record at Palo Pinto, to which I had access when I needed any data. I could have adopted the notes of block No. 97 as correctly perhaps as I did do it from the records, but I could not have certified that the work had been done on the ground unless I had formerly been there and satisfied myself of the fact by tracing the lines and finding the corners as I had done. I found it practically correct. I did run some of the lines of the block, and I found and identified lines and corners of block 97 and bearing trees and marks, natural and artificial. I found corners with rock piles, and some of them had witness trees, while others had witness trees with no marks for the corner; the corners were set up by measuring the distance from said trees.

The field-notes divide said block No. 97 into 640-acre tracts. The field-notes made by me for Bacon and Graves divide said block No. 97 into 640-acre tracts. I intended them to coincide with the field-notes of block 97, and I think they do.

When the work was adopted a competent surveyor could have traced the lines and found the corners that were established on the ground, and from these corners he could have run by course and distance to the corner of any particular 640-acre tract. I suppose he could do so yet, for I don't think the original corners have
94 been destroyed in this length of time. I think he could, for they certainly coincide with the original notes to block No. 97.

On cross-examination the witness testified:

The work, so far as my knowledge extended, was practically correct, and I did adopt the work on the same hypothesis.

JOHN E. ELGIN, by deposition on direct examination, testified:

That his name was John E. Elgin; was forty years old, and resided in Aransas Pass, Texas; is a practical surveyor; been engaged in surveying lands in Texas, and did surveying for the H. & T. R'y Co.; surveyed lands for the H. & T. C. R'y Co. in Scurry county. I know a block of surveys in Howard, Borden and Scurry county, known as block 97, H. & T. C. R'y Co. surveys; I surveyed it, or assisted in it. I surveyed block 97 in the months of June and July, 18—, being assisted in doing so by Mr. Pope, of Houston, and Geo. W. Angle, of Velasco, as surveyors. The surveying was done upon the ground, and afterwards the field-notes were written up in the office, in the latter part of August or September. Mr. Pope and myself did most of the compass-work; a third compass was run only occasionally. Mr. Angle was present with us and made most of the maps and copies of our daily field-notes.

On cross-examination the witness testified:

I cannot say how many corners of sections I actually marked and established upon the ground in surveying block 97. Some corners were marked by a stake, with bearing trees, which I think were always marked ⌶, sometimes by planting a stone, when it could be had, sometimes by piles of stones, with such bearing as could be had upon trees, mountains, rocks or other noticeable landmarks.

(This was the answer of witness to the 9th cross-interrogatory. His answers to the other interrogatories will be found on page — of this statement.)

On direct examination JOHN T. GANO, by deposition, testified:

I am a practical surveyor and was a land-locater in Texas between the years 1879 and 1885.

95 Yes, I have had considerable experience, having located myself and by others, over one million acres of land in Texas. My first location was made in 1879.

I have located lands in large bodies and blocks of surveys in Texas. First the block lines were run and generally a sufficient number of the intermediate lines were run to definitely fix the location of the sections in the block so that any surveyor might easily find any section by the field-notes, enough corners being put up and fixed by well-known bearings to forever identify the work on the ground.

They were usually divided into surveys of 640 acres by calculation and field-work, all rivers and creeks being actually meandered on the ground. Considerable block-work was done in this way, it being the general custom.

I am familiar with the customs of surveyors in locating large blocks of land. Blocks were usually located by very little surveying on the ground, the balance being what we called "chimney-corner" or "office" work. The work was considered as done on the ground, though every line was not run nor every corner put up. But when I began to locate, in 1879, nearly all of western Texas was dotted with blocks and large locations of land, and we were required by the general land office to do a great deal of field-work, even to resurveying the older locations, in order to avoid conflicts.

I never made any surveys or had any made under the fifty-cent act of the legislatures of 1879 and 1881, but I know the custom was for one surveyor to use another's field-notes, if he believed them to be correct and had the consent of the latter.

Yes, I know the general custom of surveyors in locating large blocks of land. It was to run a few of the lines and put up the most important corners—sufficient to identify and fix the location of the land. All the corners of each survey were never put up unless there was some particular reason why the owner desired it and so stipulated in his contract with the surveyor.

I have made locations in which I did not run lines of every 640-acre tract, though I did more field-work than was customary at that time, in order to avoid confusion, as above stated, and because I

generally located for individuals, each of whom wanted to see his own land. I cannot state what proportion.

96 It was not the custom to even run all the lines of the blocks unless there was danger of conflicts with other blocks.

The custom of locating lands under the acts of 1879 and 1881, so far as I know, was the same as that of locating certificates on the public land.

On cross-examination witness testified:

As for myself I did more field-work than was customary, for the reasons given in my answers to the direct interrogatories herein. I made no locations without doing field-work, and my charges were generally made under contract. My certificates were made in the usual form. I could actually survey from 10 to 15 sections per day, and twice that many when I had another State surveyor employed to assist me, as was often the case. I did no office surveying and my charges were made upon contract. I did no office or "chimney-corner" work.

No location made in western Texas, or anywhere else where there are no trees to mark the lines or the corners, can be found afterwards without resurveying and retracing the lines from some well-identified corner, though the land may have been actually surveyed on the ground a dozen times. In western Texas there are a few trees to mark lines. The only way to have fixed them so they could be identified, without retracing from some well-known corner, would have been to have fenced each line, or plowed a furrow along each line as it was originally surveyed.

Of course I would have to retrace the lines, for the corners unmarked by bearings could not be identified in large blocks one from another.

There was little or no office surveying done after 1879. I do not know what actual surveying was required by the statutes. What we call office or "chimney-corner" work was where some surveyor would tie onto some older survey by record calls and build a block of locations, without ever going on the ground to do actual surveying.

There were no locations made after 1879 without more or less actual field-work, but from retracing older locations I judge it was customary to do very little field-work when the earliest

97 locations were made. The land office was perfectly familiar with the custom of surveyors in locating lands.

Defendants introduced the answers of W. H. BONNELL to the direct and cross interrogatories, as follows:

I am a practical surveyor and land-locator, and have been engaged in the business for seventeen years, from 1874 to 1891.

I have considerable experience in locating lands and having lands surveyed. My experience in surveying and locating lands is as follows: three years as deputy surveyor of Bandera and Kerr counties, three years as field deputy in Bexar land district, eleven years as

chief deputy of Bexar land district. My experience as land-locator and surveyor runs back to 1874.

The number of lines run varied according to circumstances. Large surveys of land were divided up into smaller tracts by field-notes of each survey starting from an initial point. I have surveyed or had surveyed in the manner stated between two and three million acres.

Yes, I am acquainted with the customs and practice of surveyors and locators in surveying large bodies or blocks of land. The surveys made by me were made in accordance with said custom and practice. Sufficient surveying was done on the ground usually and customarily in surveying large bodies and blocks of land to identify the land and locate the position of prominent natural objects.

I made surveys for parties proposing to purchase lands under what is commonly known as the fifty-cent act, approved July 14th, 1879, and the amendments thereto of March 11th, 1881, and located blocks of land under said act, the field-notes of which were of record in my office. When a large block of land had been previously surveyed and the field-notes were of record in the surveyor's office, and the lines and corners of said survey had been partially run, identified and found correct by a subsequent surveyor or land-locator, such subsequent surveyor in surveying land under the acts of 1879 and 1881 would not have gone again upon the ground and made a resurvey of the same block of land, but would have copied the original field-notes. The custom and practice of survey-
98 ors under such circumstances was to adopt all former work that had been found correct.

The manner of making surveys of large bodies or blocks of land and the number of lines actually run on the ground varied according to the character of the country and the scarcity of water. In open prairie country, free from rock, lines are scarcely ever run.

It was not the custom nor practice of surveyors, in surveying large blocks of land to run all the lines of each 640-acre tract in the block. The amount of surveying customary was to fully establish the outside lines of the block, which included all the 640-acre tracts.

I have surveyed large blocks of land in which there were tracts of which I ran none of the lines. The number of corners of the interior surveys which were run varied, as I have before stated, according to the nature of the country. The custom of surveyors in such cases was simply to put corners sufficient to identify the position of the block.

It was not the custom of surveyors in locating large blocks of land to run all the exterior block lines of blocks so located.

The custom of surveyors was the same for blocks of certificates as for blocks of fifty-cent lands.

Cross-examination:

The custom in surveying large blocks of land has always been to make as many corners in a block as circumstances would permit. I never certified to an office survey, as you term it, and always

charged contract price, or legal fees. I always certified to the chain-carriers that I had in surveying the blocks in which the survey was situated. My certificate always showed an actual survey. I have run eighteen miles in one day and never tried myself at chimney-corner work.

The amount of land a man could cover with field-notes in one day would depend upon the size of the surveys and his skill as a penman.

To show the exact corners and lines of any tract of land a survey or a resurvey is always necessary, unless the lines are
99 plainly marked in timber. I always identify land according to its field-notes.

I suppose that by an office survey you mean a "chimney-corner" survey, which is a survey made by a surveyor without any knowledge of his starting point or of the land embraced in the field-notes. An actual survey is a survey made by a surveyor, either from data obtained on the ground or from data of record in his office.

Since 1838 the custom among surveyors has been that where a stake and mound were called for no corner was ever made; landowners and the general land office have always recognized this fact.

J. S. DAUGHERTY testified by deposition as follows:

I am a surveyor, and was engaged in the location of lands from the year 1873 to 1882, in Texas.

I have had a large experience in having lands surveyed for me in Texas, and my experience extends back to the year 1873. I have had lands located and surveyed for me in large bodies and blocks and surveys, but was never on the ground in person when the work was being done. My instructions to the parties who were doing the work for me, always were that they should be very careful in running their connecting lines, to see that there was sufficient land on the ground to contain the blocks into which the land was subdivided, without coming into conflict with any other surveys, and to establish the outside corners of the surveys on the block lines into which the block was subdivided. I do not know whether in all cases my instructions in this manner were observed or not. I was more interested in knowing that there was sufficient land on the ground to prevent conflict between the blocks and knowing the outside corners of the blocks were properly established, than that the corners of the individual surveys, into which the blocks might be subdivided, were established, and while I was not on the ground and cannot say from my own knowledge that the corners of the inside surveys of the blocks were put on the ground, my impression is that they were not, as a rule.

I have had several million acres of land surveyed under my direction, but always had a deputy surveyor of the county or
100 district in which I operated to do the work, and took his certificate as to the facts.

The knowledge that I have of the practice of surveyors and

locators, in surveying large blocks of land, is largely what I have heard, and from such information as I am in possession of I think the number of corners established depended largely upon the character of the country in which the work was being done; where there were streams of water and timber the lines of the individual surveys were generally run on the ground, and corners established to each individual survey. Where the country was an open-plains country there were few corners established, generally a- much as one row of corners through a block.

I made no surveys nor had any made under what is known as the fifty-cent act, but have bought some of the land which had been caused to be surveyed by parties from whom I bought, and do not know that the law or custom of surveying these fifty-cent lands was different from that of surveying any of the other domain of the State, except that it was surveyed in solid bodies; that is, there was no difference of ownership, as in the case of locating alternate scrip; and in my experience I never had relocated lands which had been previously surveyed and the field-notes of the surveys recorded in the surveyor's office, except in one instance, and in this case I instructed the surveyor to verify enough of the original field-notes by a survey on the ground to ascertain that they were correct, and if so, to put in his field-notes in conformity to them. I cannot state what any particular surveyor might do under a given state of circumstances. I can only state what was done in the case mentioned, and this seems to me to be the reasonable thing to do under such circumstances.

All of my experience in locating lands extends to having had it done, having never signed a set of field-notes on which a patent issued; and my instructions to the surveyor were as hereinbefore stated, and I always felt a greater interest in knowing there was sufficient land on the ground that was covered by the blocks that I had caused to be surveyed, and that these blocks were properly tied to known natural objects from which the corners of the inside surveys could be established, than that the corners to each individual survey should be set up, but what portion, if any, of the inside corners were set up on the ground, I do not know.

101

I think the custom was practically as heretofore stated.

I do not know that there was any difference in the custom or practice of surveyors in surveying lands under the acts of 1879 and 1881 from that of locating other lands.

On cross-examination witness testified:

Most of the land I caused to be surveyed I owned the certificate of or had an interest in the land for locating it.

I never made any office surveys of land. Practically you could survey no land by an office survey. That is, could not set up the corners on the ground.

The actual position of the corners of the individual surveys into which a block, *e. g.*, ten miles square, may be subdivided, can only be ascertained by a survey on the ground, but the area that is embraced in one hundred surveys of 640 acres each can be ascertained

by surveying the outside lines of a block ten miles square, and data furnished that will enable subsequent surveyors to establish the true position of the corners of the one hundred surveys into which the blocks may be subsequently subdivided. If some corner in the block was established and properly identified on the ground and all the surveys in the block called for connecting with surveys which tied onto this corner, a surveyor, in ascertaining the position of any individual survey in the block that ties onto the aforesaid corner by connection, could do so by beginning at this established corner of the block and running out the field-notes of connecting surveys by course and distance until the point or points for the desired corner or corners was reached.

The exact position of the corner of a survey of land can only be ascertained by going on the ground and surveying it, but data for ascertaining its true position can be furnished by establishing on the ground one or more corners in a block, and calling by course and distance in the field-notes of the surveys into which the block may be subdivided for this known and established corner, or for the corner or corners of surveys that tie onto one another by course and distance to this known and established corner.

102 An actual survey on the ground, as I understand it, is made by the surveyor going on the ground occupied by the survey, and running its boundary lines and establishing its corners, and properly connecting one of them with an older established survey or some well-known natural object. What I understand by an office survey is that the surveyor writes up the field-notes in his office without going on the ground, but calling in his field-notes for the corners of the survey so made certain distances and courses from known corners previously established by himself or some other surveyor.

As stated in answer to direct interrogatory No. 8, I never made a survey in person on which a patent was issued or demanded. I have talked with parties for whom I superintended surveys, and it was understood at the time that it was not customary to put up all the inside corners into which a block might be subdivided, but that the main point was, the block lines should be properly surveyed and corners established on the outside lines of the blocks, and that there should be no conflict between blocks. I have never made any representation to the land office as to how the surveys were made. I left that to the surveyor of the district in which they were made and the deputy by whom they were made.

W. B. Munson, by deposition, testified:

I am, or have been, a practical surveyor, or land-locator. My experience in locating lands has been very large, having superintended the location of several million acres. My experience commenced in 1872 and extended to 1883–'84, during which time I surveyed, or had surveyed, lands under the various methods of taking up of public lands in the State of Texas.

My experience has been very large and dates back to the beginning of the year 1872.

I have located large quantities of lands in blocks or large bodies of surveys, usually of 640 acres each. In surveying large blocks, the usual custom was to run the outside boundary lines of the blocks, or a part of them, putting up permanent landmarks and leaving the interior lines without running. These blocks, in writing up field-notes, were divided into 640-acre surveys, and many of
the interior surveys, in fact nearly all of them, were made
103 without actually running the lines. I could not state accurately the amount of lands so surveyed under my direction, but would say several million acres.

I am familier with the custom of surveyors and land-locators surveying large bodies of land in Texas. The method- adopted by me were in accordance with the general custom of surveyors throughout the State, under similar circumstances. I know of no large blocks or bodies of land where all the lines of the interior surveys were run and corners put up. The usual custom was to run the outside boundary lines, or a part of them, meander the large streams, if any, and then subdivide the blocks and write up the field-notes therefrom.

I know of several cases where lands had been previously surveyed and field-notes recorded, where surveyors, who were familiar with the survey, adopted them without going a second time on the ground, the purpose of the surveyor being to identify the land. There would be no necessity or reason of the surveyor running lines a second time if he was already satisfied of the correctness of the first survey, and it is not customary for surveyors to go over their work a second time in the event of a second location. It has been the custom of Texas surveyors to adopt the work of other surveyors as far as they could safely do so.

Yes. The general custom has been to run the outside boundary lines of blocks and subdivide them in the office. This has especially obtained in the prairie country where it was expensive to make permanent landmarks, there being neither timber nor stone at hand. The mere running of lines across the prairie and making small temporary earth mounds that must soon disappear, would add little if any to the ability of the later surveyors to identify the land, and hence the custom arose to run fewer lines and mark them more permanently.

No. I have never known it done in all my experience in locating large blocks. As I have before stated, the custom was to survey the outside boundary and meander the streams, running few if any of the interior lines. It was not the custom to run all the lines of each 640 acres, and in most cases none of the lines of the interior surveys were run. This was especially the practice where the entire block was surveyed for a single owner.

In locating large blocks there were many of the interior
104 surveys of which none of the lines were actually run on the ground. The number of the surveys in a large block in which none of the lines were run would depend upon the size and shape of the block and the character of the country, but I would say that a very small proportion, if any, of the surveys had all of

by surveying the outside lines of a block ten miles square, and data furnished that will enable subsequent surveyors to establish the true position of the corners of the one hundred surveys into which the blocks may be subsequently subdivided. If some corner in the block was established and properly identified on the ground and all the surveys in the block called for connecting with surveys which tied onto this corner, a surveyor, in ascertaining the position of any individual survey in the block that ties onto the aforesaid corner by connection, could do so by beginning at this established corner of the block and running out the field-notes of connecting surveys by course and distance until the point or points for the desired corner or corners was reached.

The exact position of the corner of a survey of land can only be ascertained by going on the ground and surveying it, but data for ascertaining its true position can be furnished by establishing on the ground one or more corners in a block, and calling by course and distance in the field-notes of the surveys into which the block may be subdivided for this known and established corner, or for the corner or corners of surveys that tie onto one another by course and distance to this known and established corner.

102 An actual survey on the ground, as I understand it, is made by the surveyor going on the ground occupied by the survey, and running its boundary lines and establishing its corners, and properly connecting one of them with an older established survey or some well-known natural object. What I understand by an office survey is that the surveyor writes up the field-notes in his office without going on the ground, but calling in his field-notes for the corners of the survey so made certain distances and courses from known corners previously established by himself or some other surveyor.

As stated in answer to direct interrogatory No. 8, I never made a survey in person on which a patent was issued or demanded. I have talked with parties for whom I superintended surveys, and it was understood at the time that it was not customary to put up all the inside corners into which a block might be subdivided, but that the main point was, the block lines should be properly surveyed and corners established on the outside lines of the blocks, and that there should be no conflict between blocks. I have never made any representation to the land office as to how the surveys were made. I left that to the surveyor of the district in which they were made and the deputy by whom they were made.

W. B. Munson, by deposition, testified:

I am, or have been, a practical surveyor, or land-locator. My experience in locating lands has been very large, having superintended the location of several million acres. My experience commenced in 1872 and extended to 1883–'84, during which time I surveyed, or had surveyed, lands under the various methods of taking up of public lands in the State of Texas.

My experience has been very large and dates back to the beginning of the year 1872.

I have located large quantities of lands in blocks or large bodies of surveys, usually of 640 acres each. In surveying large blocks, the usual custom was to run the outside boundary lines of the blocks, or a part of them, putting up permanent landmarks and leaving the interior lines without running. These blocks, in writing up field-notes, were divided into 640-acre surveys, and many of
103 the interior surveys, in fact nearly all of them, were made without actually running the lines. I could not state accurately the amount of lands so surveyed under my direction, but would say several million acres.

I am familier with the custom of surveyors and land-locators surveying large bodies of land in Texas. The method- adopted by me were in accordance with the general custom of surveyors throughout the State, under similar circumstances. I know of no large blocks or bodies of land where all the lines of the interior surveys were run and corners put up. The usual custom was to run the outside boundary lines, or a part of them, meander the large streams, if any, and then subdivide the blocks and write up the field-notes therefrom.

I know of several cases where lands had been previously surveyed and field-notes recorded, where surveyors, who were familiar with the survey, adopted them without going a second time on the ground, the purpose of the surveyor being to identify the land. There would be no necessity or reason of the surveyor running lines a second time if he was already satisfied of the correctness of the first survey, and it is not customary for surveyors to go over their work a second time in the event of a second location. It has been the custom of Texas surveyors to adopt the work of other surveyors as far as they could safely do so.

Yes. The general custom has been to run the outside boundary lines of blocks and subdivide them in the office. This has especially obtained in the prairie country where it was expensive to make permanent landmarks, there being neither timber nor stone at hand. The mere running of lines across the prairie and making small temporary earth mounds that must soon disappear, would add little if any to the ability of the later surveyors to identify the land, and hence the custom arose to run fewer lines and mark them more permanently.

No. I have never known it done in all my experience in locating large blocks. As I have before stated, the custom was to survey the outside boundary and meander the streams, running few if any of the interior lines. It was not the custom to run all the lines of each 640 acres, and in most cases none of the lines of the interior surveys were run. This was especially the practice where the entire block was surveyed for a single owner.

In locating large blocks there were many of the interior
104 surveys of which none of the lines were actually run on the ground. The number of the surveys in a large block in which none of the lines were run would depend upon the size and shape of the block and the character of the country, but I would say that a very small proportion, if any, of the surveys had all of

their lines actually run on the ground, and not more than an average of one-tenth of them had any of their lines run. It was the general custom of land-surveyors throughout the State to locate large blocks of land in this way without running any of the lines of most of the interior surveys.

It was not the custom of locaters generally to run even all the exterior lines of blocks. More frequently one or more of the block lines were run and connections made with previous locations so that these block lines could be used as base lines in cutting up the blocks into surveys should it be desired to do so.

The custom of surveying lands under act of 1879 and 1881 was the same as that adopted in making other locations in large blocks. Especially was this the case where the entire block was filed upon and surveyed for the same ownership, for in such cases neither the owner nor any one else would have any interest in having interior lines run.

On cross-examination the witness testified:

I have explained in my answers to the direct interrogatories the customary manner of surveying large blocks of land, the custom being to run outside boundary lines and meander principal streams, then subdivide by plats. The usual certificate was attached to all the surveys made, the work on the ground being considered sufficient to identify the land. The charge made for making surveys in which no interior lines were run was in accordance with the contract made with the party owning the certificate and having the work done. The chain-carriers who carried the chain over the line actually run were considered and certified to be the chain-carriers for all the surveys of the block. The amount of land which could be surveyed in a day depended upon the character of the country and the number of lines run in locating a block. No surveying was done in the office, but the description of field-notes of
105 the land were there prepared, and a rapid penman could write up the field-notes for from fifty to 100 surveys a day.

I have prepared field-notes for as many as one hundred surveys in a day, after the surveying in the field had been done and plats from which to write field-notes prepared. These were not considered office surveys, as the field-notes to all surveys are prepared in this way in the office. I surveyed or superintended the surveying of many thousands of acres through northwestern Texas in the manner indicated in my answers to the direct interrogatories. The list of the surveys and the owners thereof would be too long to enumerate in this connection.

Yes, and it is likewise true that had all of the lines of these surveys been run where neither timber nor stone existed with which to mark the lines or corners, the same process would have to be adopted to again identify the land. The simple running of lines and temporary marking of corners in a smooth country would be of no advantage in years afterward, when the frontier lands were required for settlement, as all traces of such work would have long since disappeared and left only the courses and distances from per-

manent landmarks or monuments, whose lines had not been run, would be identical with that necessarily adopted to find one whose lines had been run and corners temporarily marked.

Yes, it is true that a resurvey would be necessary to identify the land, in any event, whether all lines were run or not.

A part of the work in making all surveys is necessarily done in the office. The amount of field-work done varies almost infinitely, and so long as a sufficient amount is done to lead to an easy and accurate identification of the land, I can see no difference between what you are pleased to term an office and actual survey. On an average, in the State of Texas, there is not one survey in twenty in which all of the lines and all of the corners were actually run and marked on the ground in making the original survey, and of the nineteen*th*-twentieths the amount of work actually done on the ground varies from none at all up to something near completion, the object of the survey being to fix and identify the land. I would regard any method that accomplishes this purpose as sufficient compliance with the law. In surveying large bodies of land the owners of certificates, contracting for their location in this manner,
106 were usually fully aware that the interior lines of the blocks would not be run, and in cases where contracts were made with railway companies, contracts frequently stipulated what lines should be run and I have never known of a contract to be made requiring the actual running of all interior lines in large blocks. I made no explanation or disclosures for whom I located lands, as the people with whom I dealt usually understood the customs of land-locators, but had they inquired about it I should have explained fully the methods actually employed. It was well known by the employees and officials of the general land office that in surveying large blocks it was not customary to run all the lines. The number of surveys dated on a single date by the same surveyor would preclude such an idea.

R. M. HALL, by deposition, testified:

I was commissioner of the general land office of the State of Texas in 1887 and 1888. I am a practical surveyor. Have had several years' experience as such. Was county surveyor of Grayson county three years. I appointed J. M. Strong, of Dallas, as such State surveyor. I do not remember whether my instructions to Mr. J. M. Strong were verbal or in writing. As well as I now remember them, they were as follows: He was directed first, to meander that portion of the boundary of Greer county formed by Prairie Dog Town and Red river-, connecting said meanders, from time to time, with the section and township lines and corners, as established by authority of the United States. He was also directed to trace the 100th meridian of said county and make similar connections. He was further directed to then run the township and section lines, as far as necessary to enable him to classify each section in the county and prepare field-notes in conformity with the Texas land system of each section and fraction of section in Greer county. He was in-

structed not to run any more of said lines than was necessary to accomplish the purpose indicated. He was further instructed to disregard all minor discrepancies between his work and that previously done by the United States, the object being to make his surveying correspond and coincide with that of the United States, in order to protect the rights and interests of citizens who had made settlements and improvements in accordance with the United States surveys. As well as I remember, the discrepan-
107 cies discovered were of such small importance that the result was a virtual adoption of the survey made under direction of the United States Government, even to the numbering of each and every section.

The work done under my direction was equivalent to the adoption of the whole of the United States Government surveys within the limits of Greer county. Of course, on the State boundary Mr. Strong's surveys stopped, while the United States surveys crossed the streams before mentioned.

On cross-examination the witness testified:

I do not remember whether my instructions were written or verbal. I do not remember that any other than Strong was present. Except as indicated in the case of Strong, in my answers to direct interrogatories, I never gave instructions to any surveyor to adopt field-notes of surveys made by former surveyors.

I have no recollection of ever having approved adopted field-notes, where the law required a survey made on the ground. I did refuse to issue patents upon Bacon and Graves' locations, because I had no authority to do so until the treasurer's receipts, showing that the lands had been paid for, were filed in the general land office.

On direct examination W. C. WALSH, by deposition, testified:

I was commissioner of the general land office of the State of Texas. I held such official position from 1878 to January, 1887. I appointed Dennis Corwin to represent the State in the survey of one million acres of land for the common-school fund and one million acres for the university fund, which was set aside by the act of 1883. I had previous to the time referred to in my answer to second interrogatory had surveyed for the university one million acres of land, I believe in 1879, which had been given to the university by the constitution of 1876. This last-named one million acres was surveyed under contract by R. M. and T. A. Thompson, they being the lowest bidders for the work. Preceding the awards of the contract I designated a portion of the unappropriated land from which this university land was to be selected, and by such designa-
108 tion excluded other locations and surveys from the territory named until the work was completed. The contract was given to R. M. Thompson and T. A. Thompson at, I believe, $4.50 per section, which was about one-half the price asked by other bidders. This low bid was explained to me by one of the Thompsons

as resulting from the fact that they had already surveyed several hundred sections in the reserved territory upon which they expected to locate certificates, but that my designation had covered the land they had surveyed, and that they were compelled to underbid every one else or lose the work they had done. It was understood between the Thompsons and myself as commissioner of the general land office that the work which they had previously done should be adopted by them for the university. Dennis Corwin was instructed to select and survey one million acres of the university and one million acres for the common-school fund. I furnished said Corwin, from maps of surveys already in the land office, skeleton sketches of blocks of surveys which had been sectionized by the Texas and Pacific Railway Company, and also, I think, of some blocks of surveys which had been returned to the land office under the act of July 14, 1879, commonly called the fifty-cent act, and forfeited. I instructed him to examine these various blocks of land, and from among them select the best blocks until he had a sufficient amount to make two million acres. I instructed him to run connecting lines from block to block, and to so mark and describe each block that its position might be readily determined.

On cross-examination the witness testified:

I gave Dennis Corwin both written and verbal instructions. The written instructions are a matter of record in the general land office. I have no copy of them. As to verbal instructions, I do not remember whether any one was present when they were given besides Corwin and myself or not. I never did give instructions to adopt field-notes under the act of 1879 and 1881. As commissioner of the general land office it was not my duty to approve field-notes except in cases such as those to which I refer in my answer to direct interrogatories. There is a provision of law governing surveys which, under certain circumstances, permits the adoption by one surveyor of work done by a former surveyor. I suppose I
109 have respected such adoption of field-notes when commissioner of the general land office, but do not remember the particular cases.

DENNIS CORWIN, by deposition, testified:

I was appointed or employed by Hon. W. C. Walsh, commissioner of the general land office, as State surveyor. I am a practical surveyor. Have been engaged in the business of surveying a greater part of the time since 1853. My first work in Texas as a surveyor was done in the employ of the Texas Emigration and Land Company in surveying the Peter's Colony lands. Then in making surveys in connection with Robert Crezbaur, of the university and asylum lands in 1856 and 1857. Have been deputy surveyor of Young, Cook and Bexar districts in making surveys for railroad companies and individuals. In 1859, and until the beginning of the war between the States, I was district surveyor of Travis district. Since 1865 I have been engaged in the business

up to the present time and was State surveyor in 1883 and 1884. My first duty as State surveyor was to select and survey one million acres of land for the university fund and one million acres for the public free-school fund under the instruction and direction of Hon. W. C. Walsh, commissioner of the general land office. My instructions were to go into the Texas & Pacific reservation and select the best unappropriated land that could be found. I returned field-notes for one million acres for the university fund. My instructions were to select from surveys and blocks of surveys by parties under the act of 1879 and 1881, and were forfeited, and from Texas & Pacific Railway Company surveys which had reverted to the State. I was under instructions to select the best lands of such forfeited surveys, and designate them as selected for the university and school fund. I was furnished with skeleton maps from the General Land Office, showing such Texas and Pacific Railway Company's and other forfeited surveys, the field-notes of which had been returned to the general land office and platted on the maps of said office. I was particularly instructed to run connecting lines between surveys and blocks of surveys that were not connected, and to return maps and sketches of such surveys as I had selected for the university and school funds. I did make and return maps and sketches showing what surveys I had selected in compliance with in-
110 structions, also showing connecting lines run by me. Also descriptive notes showing the character and quality of the lands so selected.

On cross-examination, the witness testified:

I had no instructions whatever from Commissioner Hall relative to the selection of university and school lands. I was instructed by Commissioner Walsh (not Hall) to run connecting lines so as to determine the exact locality of the land selected, and the relative position of blocks and parts of blocks on the ground.

I had both written and verbal instructions. I did not preserve the written instructions, and cannot now place my hand on them. I do not remember any one present when I received my verbal instructions. I have stated in my answer to direct interrogatories all the instructions I received from Hon. W. C. Walsh, commissioner of the general land office, as far as I remember them. I have stated in my answer to direct interrogatories that I was instructed to make selection of the best lands I could find in blocks of surveys made under the acts of 1879 and 1881, the field notes of which have been returned to the general land office, and which, for any cause, had become forfeited and reverted to the State, the maps and sketches of which were furnished me by the general land office. I did select some of said surveys.

W. L. McGAUGHEY, by deposition, testified:

My name is W. L. McGaughey, age 54 years, residence Austin, Travis county, Texas. Have resided at Austin since January 20th, 1891, I hold the office of commissioner of the general land office of

the State of Texas. I have had very little experience in Texas. My experience in general land office dates from January 20th, 1891. I had very little experience in said office prior to that date. The Bacon and Graves field-notes appear from the records of this office to have been surveyed and filed and returned through the Palo Pinto land district. I do not know what surveyor the commissioner of the general land office recognized at that time as having jurisdiction in said counties. The records of surveys in said counties (Scurry and Borden) was never furnished to Shackelford county, so far as I know or am informed.

111 C. H. EARNEST testified for the defendants:

I live in Colorado. I have been here about seven years. My business is real estate. I have been a surveyor, and for a short term was county surveyor. I have been up and down the Colorado river more or less. It is a very hard matter to tell the average width of the river. I would not think the stream was exceeding twenty feet on an average, there is so much of it goes dry during the summer. It stands in holes in some places. The T. & P. surveys cross the stream. I believe the T. & P. work is the only work on the river. I do not know how the lines of this particular survey on which the town stands run, but I think they cross the river. The southwest corner of survey 41 is carried in the bend of the river. It does not front the river. I have been on block 97. I surveyed on one portion of it three or four years ago. I got the notes of J. E. Elgin from the surveyor's office here. My recollection is that I found the corner where I struck block 97, the southwest corner of 64, it is the north of 65. The reason I remember that is, I was running out Geo. Reager's, and it is the southwest corner of the Reager surveys. That is the only instance in which I remember going on block 97, in my capacity as surveyor. As the river runs through block 97, it is no wider than it is along here.

Cross-examined by the State:

My firm are local agents of the Texas and Pacific lands. I bear no relation to the H. & T. C. R'y at all. I never ran surveys for the T. & P. I have read the law recently on the stream subject. I do not know whether I read the act of 1881 or not. I do not think I have read the amendment to the fifty-cent act recently. The stream that runs up here is the main Colorado. The country tributary to Colorado City is called the Colorado country. It comprises some 15 counties and runs as far as Kent, Garza, Scurry, Borden, Crosby and Lubbock. The counties mentioned are drained by the Colorado river. As I recollect it, Double Mountain runs through the lower portion of Garza county. It would be 30 miles from where the Colorado river touches the south boundary line of Bordon county to Double Mountain fork, the tributary of the Brazos.

112 There are three streams that flow into the Colorado, that I remember, of any importance; they are Canyon creek, Bluff creek and Gabbitt's creek; Bull creek, I think, runs in also.

There are four streams. After you get over the water-shed it is a fact that those four streams of the Colorado river drain that entire section of the country south of the Mountain fork of the Brazos. The principal river that is in the county of Mitchell is the Colorado river. Sterling is the first county south of here. The Colorado and North Concho, drain that county, I think. I do not know that there are any rivers in Texas larger than the Colorado river, unless it is Red river. I do not know that the Colorado is bigger than the North fork of Red river. I never was on the Canadian river. I have never estimated what the length of the Colorado river is. I think it must be nearly four hundred miles. I think it is the principal river of the country through which it passes. I know as a matter of fact that these State surveyors did not, as a rule, return the field-notes to the surveyor's office. The portion of block 97 which I surveyed is not in Scurry county. We have no surveyor of this county. The field-notes are, I presume, in the surveyor's office. I have never seen the channel of the Colorado in more than two or three places, as it runs through Scurry county. I would not think the average width of the river through this county was twenty feet. The channel might be sixty feet, perhaps. I would say the width of the river here down by the bridge was seventy or seventy-five feet. I do not believe I know where block 96 is; if there is a block 96 I do not know of it. I do not remember whether there is block 95. I have never seen it on a map. The survey that bounds block 97 on the south I think, is a little narrow strip of block 26, and on the west, I think, block 25, H. & T. C. and Lavaca navigation surveys.

On the east, Peter Smith and Kirkland Field surveys. Some of them front the river. I think the Smith land fronts the river. There is one survey of the Kirkland and Field that crosses the river. I do not know who surveyed the Peter Smith lands.

Redirect examination by defendants:

I think there are two or three of the Peter Smith surveys that front the river. I have never run any surveys in this coun-
113 try that front the river. The Colorado river up here is not a running stream the year around.

Recross-examination by the State:

I think there is an undercurrent during the dryest time through the sand. Probably the channel has existed as far back as the period that I do not think the geologists have arrived at. I should judge the stream was becoming wider. There is no sign of the channel falling in. It still remains the only channel.

JOHN BEAL, for the defense:

I live in Colorado. Before 1883 I lived in Falls county. In 1879 I was in the cattle business. I was on Double mountain in Garza and Borden counties. I am familiar with that section of country. I know a man by the name of E. A. Williams. He was

a surveyor when I knew him. He did some work for me in 1882 in Borden county in block 97 and block 30, on the T. & P. lands. I was with him. I went to Palo Pinto and made my application for a piece of land that laid between the Houston & Texas Central and the Texas & Pacific lands. Hunted up Mr. Williams, district surveyor. I was told where I could find him. I found him up in Fisher county. He made appointment with me. I told him what lines I wanted him to find and see how much there was in the vacant strip.

We went up above Snyder—the country was not fenced—to where there was a cottonwood tree on one bank of Deep creek. He hunted this tree up himself. He had data, I suppose. He said that is where he wanted to go to. North of that tree we found a regular corner. He began at that corner and surveyed to the west boundary line of block 97. He ran through block 97. I believe it was 25 miles. Then he surveyed north of that block. He found corners on that line. As well as I remember we found most every mile corner. They were little piles of rocks. We did not look for any bearing trees. We found a good many corners of the block. Then he surveyed north seven or eight miles to the north end, to where he thought this vacant strip was. He surveyed this vacant land I speak of and got the amount that I filed on. I am pretty
114 familiar with the Colorado river. I first came out here in 1879 and have known the Colorado river ever since. Bull creek has not always water running in it. The water does not run in the Colorado river all the time. When the river gets up the average flow of the water is big, but sometimes there is none in it at all. It is hard to tell the average flow of the water the year round. It flows from one hole to another hole sometimes, and they are three or four hundred yards long. Sometimes it goes under the sand, and sometimes it does not run at all. It does not run one-half the year here. I reckon the average flow of the water is four or five feet, or something like that. I paid Williams something over $300 for the work. I believe he charged me $3 a mile.

Cross-examined by the State:

I do not remember what section of block 97 Williams commenced work on. It was on Deep creek, right close to where Mr. Mooar's ranch is now. He commenced work on the first section line of the creek by his ranch. I made a written application to the district surveyor of Palo Pinto for the land under the fifty-cent act. I signed the paper individually. I applied to purchase the amount of land shown by the map to be vacant. I thought at the time there would be five sections. Mr. Williams made field-notes as he went along. He had a book with him in which he would make entries, and I supposed he was taking field-notes. He took the book to Palo Pinto with him, and my instructions were to go there and have them fixed up and forwarded to Austin at once. I never saw them after he left with them. I did not get the land. I never tendered the money to the State treasurer. I never paid the treasurer for it.

My headquarters are at a ranch on a tributary of Bull creek. The place is enclosed about twenty-five miles. My purpose of going there was where I could get water, and where there was plenty of outlet. The only inducement I had to go there in the first place was that there was plenty of elbow-room and very few stock, if any at all. We want living water if we can get it. I have had cattle on the Double Mountain fork of the Brazos. Sometimes the water gets very low on that place. There is some water the year round on that stream.

On being asked if there was water the year round in Bull creek witness replies: In 1879 and 1880 there was no water during
115 June. Since that time, and during the last four or five years Bull creek has had water in it. Since I fenced Gabbitt's creek there has been water all the time. I am upon sections Nos. 530 and 531. There is water all the year round in Gabbitt's creek. I have got tanks for my cattle. The average width of the channel of the river (Colorado) is 200 feet. I think that all these rivers have an undercurrent under the sand. I have dug into Double Mountain fork and have found water two or three feet down. I have watered my cattle that way, but it was when I first came here.

The Colorado is the principal river that runs through and drains the section of country south of the Double Mountain fork. It has been here ever since I have been here. I have been president of the Jumbo Cattle Company. I was president until last December. I was general manager in 1886. I was made president and general manager on last December. I was made secretary and treasurer. I am vice-president now. I was president on the 29th day of March, 1889. I have never paid the judgment in favor of Bacon and Graves for $2,050 rent for 37 sections of land. They have never called on me to pay it. The main point why we have not paid the judgment for rent is that they have never called for it. I have an arrangement with them to purchase if they get title. I do not believe we have made any arrangement for the judgment for rent. We pay $1.25 per acre for the land under the agreement. I do not remember that we have anything in the agreement about paying them for the use of it. I have not the agreement with me. I presume it is in possession of the secretary and treasurer, in the papers at Calvert. I do not remember that I was in Austin while the case was being prepared for the supreme court, *i. e.*, the case of Bacon and Graves *vs.* The Jumbo Cattle Company. I was not present at any conference where it was decided to leave out any questions and submit the balance of the case to the supreme court.

I made the arrangement to purchase the land before the judgment was rendered in the lower court, in the case of Bacon and Graves against The Jumbo Cattle Company, and while it was pending. I employed an attorney to represent us. I am still paying the State lease on these lands.

I think the suit was brought in 1889. I will not be posi-
116 tive. Mr. Wilmoth is the attorney representing us. I would not know the agreed statement of facts if I were to see it. I never saw the papers in the case. I had a copy of the original peti-

tion with the citation. I do not know whether I would know it or not. I believe I received some information that the suit would be filed before it was filed. The agreement to purchase, as well as I remember, was made after the suit was filed. That was some time in 1889. I suppose the land is worth $1.00 or $1.25 per acre now. I wrote my attorney to answer the citation and attend to the matter. I paid Wilmoth $150 as fees. I do not know anything about anybody else who paid him any fees. The railroad never paid it back to me. I did not have any agreement that he should pay it back.

Redirect examination by defendants:

I notified the railroad to take part in the defense. I leased one-half of that land from the railroad and the other half from the State.

J. WRIGHT MOOAR, for the defendants:

I live in Scurry county. I have been identified with Scurry county since the 7th day of October, 1876; that was the time I went there. I settled at the head of Deep creek. The number of the section I stay on is 336, block 97. I have lived there since 1876. Something less than a month after I was there I noticed surveyors' marks on a tree. We first saw it on a cottonwood tree. I sent men to cut poles and they brought in a cottonwood tree that had some surveyors' marks on. Either my brother or I afterwards went out with them to see that they did not cut any trees with surveyors' marks on. I knew D. L. Cunningham; he held at that time the office of district surveyor. He was located at Palo Pinto; I think it was Palo Pinto district; I am not certain as to name of district. It was the district I lived in. I saw Mr. Cunningham on block 97 in the winter of 1881 and 1882. He pointed out to me corners of surveys on block 97. He found for us the northeast corner of section 336. It was a little pile of rock in the ground (buried). It was somewhere about 300 yards from the cottonwood tree, as well as I can remember. He measured from the cottonwood tree, took his bearings from his field-notes, and found the cor-
117 ner. There are not many trees in the country except mesquite. I have never been with any other surveyors besides Mr. Cunningham. I know the Colorado river, also Bull creek. I do not consider the Colorado a permanent running stream. I have seen it when there was no water in it. I have seen it a good many times. From my observation I should say that the river runs one-half the time only. The other half of the time it is a small stream running between water holes that stand in the bed of the creek. I could not approximate what was the average the year round. I have seen it when it was a big stream, and also when there was not any water in it at all. I do not think it would average twenty feet all the year round. When it runs it does not run over ten or twelve feet in width and five or six inches in depth.

Cross-examined by the State:

There is a suit filed by Bacon and Graves against me. I do not remember when it was filed. I guess it was filed about the time the balance of the suits were filed. I think it was in 1889. I forget now whether I was served with a certified copy of the petition along with the citation. The suit was for rent of 37 sections of land at a rental of $1,500 a year. It was against my brother and myself. The case has never been tried. I cannot tell you why it has never been tried. I have had lawyers employed to represent me in this case. I suppose they always represented me. I have an agreement to purchase the land in case they perfect title, at $1.50 per acre. I made that agreement with them; I think it was last March. It was last spring. I should expect the case dismissed if they made me a title. I do not know that there was any such agreement as to let the case drag on, and then if they made me a title they would dismiss the case. I think the rent was 4 cents per acre. There is no provision about the rent if we purchased the land. The agreement is in writing. I have not got it in my pocket. It is in the possession of my lawyer. His name is Mr. Hudson. I do not know where he is now. I do not know that he has the agreement in his possession. I saw it at the time it was made. No, I am mistaken, I do not know if I ever saw the original agreement. I signed it last March. I gave it to Mr. Hudson. I think there were two copies made, I do not remember. There was nobody present
118 but Mr. Hudson when I signed it. I do not know who represented Bacon and Graves. I think I signed two, that is, in duplicate, but I do not remember now. I signed the agreement when I was signing a number of other papers. I was to get the land at $1.50 per acre, and I would have to pay the State $2.00 per acre. I think I signed the agreement in Mr. Hudson's office. Mr. Maddox was with me last March. It was just before the agreement was entered into. I went to the pasture with Mr. Maddox and Mr. Looney. We talked about the agreement there. I did not talk to anybody else besides Maddox. I talked to Mr. Looney as attorney on the other side. I do not know that Mr. Hudson has left the town since you talked with my brother on Saturday. I came in Friday night and wanted to see him, and have not been able to do so yet. I could not tell you the width of the Colorado from bank to bank, I never measured it. I have crossed the stream many times and stepped on the bottom. The average width from bank to bank, as it runs through the section of country, might be fifty to seventy-five feet wide, but I do not know. I never had occasion to dig down to find water in the river bed. Sometimes when the water is standing in holes there is a small stream connecting the two holes together in some places. The general supposition is that there is a current in the sand. The water is pretty salty sometimes. The Colorado river is the principal stream between here and the Brazos, and drains that country. There is one county north of here, and the next county the Brazos runs through. The distance from here to the Brazos river by land, direct,

would be thirty-five or forty miles. The Colorado river runs through Borden county. Borden is a little west of Scurry. It drains all of Borden county. Fisher county is east of Scurry. It does not drain any part of Fisher. The principal creek that runs through Fisher is the Clear fork of the Brazos.

Redirect examination by the defendants:

The arrangement I made with Bacon and Graves has all been since the decision of the Jumbo case.

JOHN MOOAR, for the defendants:

I have been living here this time about two years. I went to Scurry county in 1876. I lived in Scurry county most of the time in the years 1876–'77–'78 and 1879. I think I came down in the winter of 1880. I lived on section 436, in block 97. I have lived on section 336. The first year I lived on section 336. I have been with surveyors there and seen marks and corners. The first surveyor's marks I saw were not shown to me, I happened to see them on trees. Mr. Cunningham was the first person that ever showed me any corners. I think I went with him to three different corners. Cunningham was the district surveyor of Palo Pinto county. That was in the winter of 1881 or 1882. It was the time we were talking about buying the land. Mr. Cunningham found his first corner by taking his bearings from a cottonwood tree. I think he had field-notes with him. I had never seen a corner prior to that time. C. W. Angle showed me some corners. He used to be a land man in San Antonio. He showed me several corners; I do not know exactly how many. He showed me corners of section 336. The corners were marked with little piles of rock set in the ground. Rocks are not plentiful in that country. A man could get the rocks out of the creek. There were what we called proof trees. I saw a man by the name of Chalk. He asked me to show him some corners. He came to resurvey the lands.

He made new corners there. Some of them were 33 to 10 feet away from the old corners; some 25 feet. There were three lines of mounds thrown up instead of bearing trees. He dug round and made a pile of dirt in the middle. He made two surveys there. The first time he made the survey he moved the corners two or three feet, and the next time he made the survey he moved them four or five feet. The variation was not more than three feet from the old original survey. When he made the second survey some of the surveys were nearer to the old corner than the other. The last corner that I know anything about was in the center of the line up there. Mr. Cunningham made that corner. I never saw a man surveying; I just met a surveyor as he was coming on the ground. I would not say that a man who came from Jack county was a man by the name of Spiller. It was a man who examined Mr. Chalk's work. I never saw him mak any corners. I have never seen any corners said to have been made by Marshall, the surveyor of this district. I have heard them say there was a difference of 50 varas.

I have been on the Colorado river often; I have crossed in various places; I have seen it dry; it is dry in places, and in some
120 places the water stands in holes; it runs a portion of the year and stands in holes the balance of the year. The river only runs one-half of the year, the other half it is dry in places and stands in holes in others. I am not familiar with Bull creek. I have seen Deep creek dry in some places. It gets dry almost every year in some parts. After it runs from Snyder up north I do not think it touches block 97. The average width of the Colorado from bank to bank is about 150 feet. I would not think the average width of the water would be as much as 25 feet. We have had a hard rain recently, as good a rain as I know of, and there is hardly any water in it now. A man can jump across it, I guess. I have crossed it a week after the rain when it is running along over the shoals. I do not believe when the river gets down it will average ten feet of running water.

Cross-examined by the State:

I am a brother to the preceding witness. I am a partner of his in the land. I am one of the defendants referred to in the suit of Bacon and Graves instituted against us. I have not got the agreement. I do not know where the agreement is; I suppose it is in the possession of Mr. Hudson. Mr. Hudson has gone to the Circle Bar and Bar Ten ranch. I think he left Saturday afternoon. He left the day before you were talking to me. I have not any access to his papers. He and his wife have both gone. I do not remember how many of these agreements were signed. I expect I signed it myself. I do not remember. If I signed it I signed it here in town. I guess Bacon and Graves had a copy. I do not know who took it for them. They were in the possession of Mr. Hutchinson. He might have given it to Mr. Maddox or Mr. Looney. There is sometimes a small connecting stream between the holes where the water runs. There might be a mile between two holes and the water would not run between the two holes. I have dug down in the bed of the Colorado river and found water. It can be found in small quantities. I do not know how the holes are supplied with water. I suppose there must be a little water soaked through the sand. The average width of the banks of the river is 150 feet. I cannot say how far it will average that. It is the principal river that drains Mitchell, Scurry and Borden counties. Kent and Garza are drained by the Double Mountain fork of the Brazos. I
121 think it is the principal stream south of the Double Mountain fork when you get over the divide far enough. The Colorado river is a pretty long river from here to the gulf. I have never been down the river. It is not very far to where it rises. It rises between here and the foot of the plains. I have been to the canyon in which it rises.

Redirect examination by defendants:

I made application to the State to purchase the lands. I am paying the State money for leasing. I have never paid Bacon and Graves anything.

Recross-examinanation by the State:

I made application for the purchase of the land to the State in 1883, I think it was. I would have to pay the State $2 per acre. Bacon and Graves would do better by fifty cents per acre. I think that is the contract, but, as I stated, I do not remember exactly now what it was. I bought some land of the State.

Redirect examination by defendants:

On my memory being refreshed, I bought the land from the State in 1884. I bought one section, by being an actual settler, on the 1st of January, 1883, at $1 per acre. I think I have bought ten sections at $2 per acre. That is, myself and brother together. The balance of the land we have enclosed we are paying the State lease on.

On recross-examination by the State witness testified:

I really do not know what we are paying as a lease. I have never seen the lease.

Variation, 9° 21′ east; scale, 4,000 varas per inch.

THE STATE OF TEXAS,
Palo Pinto Land District.

Survey No. 3, Block No. B.

Field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legis-
122 lature of the State of Texas, entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, A. D. 1881, situated in Scurry county, on the waters of Colorado, a tributary of the —— river, about — miles from ——, and known as survey No. 3, block No. B: Beginning at a stake, the southeast corner of No. 2; thence north 1,900 varas to a state and earth mound; thence east 1,900 varas, a stone mound; thence south 1,900 varas to a stake; thence west 1,900 varas to the place of beginning. Bearings marked ⩫. Surveyed January 17, 1883.

J. H. MILLER,
J. B. PIERCE,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office in Book P, page 3, March 14, 1883.

JOEL McKEE,
Surveyor of Palo Pinto Land District.

File 54836. Bexar scrip. Bacon and Graves field-notes. Filed March 17, 1883.

——— ———,
Commissioner.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Dec.* 19, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a
123 true and correct copy of the original field-notes, with all endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and affix
[SEAL.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner General Land Office.

Variation, 9° 21′ east.

THE STATE OF TEXAS,
Palo Pinto Land District.

Survey No. 4, *Block No. B.*

Field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto approved March 11, A. D., 1881, situated in Scurry county, on the water- of Colorado, a tributary of the —— river, about — miles from ——, and known as survey No. 4, block No. B: Beginning at a stake southeast corner No. 3; thence north 1,900 varas to a stone mound; thence east 1,475 varas, creek 1,700 varas cross Colorado river, 1,900 varas to a stake; thence south 95 varas cross Colorado, 1,900 varas to stake; thence west 1,900 varas to the place of beginning. Bearings marked $\overset{\equiv}{\times}$, surveyed January 17, 1883.

J. H. MILLER,
J. B. PIERCE,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners,

with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-
124 notes and find them correct, and that they are recorded in my office in Book P, page 4, March 14, 1883.

JOEL McKEE,
Surveyor of Palo Pinto Land District.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Nov. 19th*, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, hereby certify that the above and foregoing is a true and correct copy of the original now on file in this office, together with the endorsement thereon.

In testimony whereof, I have hereunto set my hand and
[L. S.] affixed the seal of said office the day and date last above written.

W. L. McGAUGHEY,
Commissioner.

(1.) File 54837, Bexar scrip, Bacon and Graves, field-notes. Filed March 17, 1883.

——— ———,
Commissioner.

Variation, 9° 21′ east.

THE STATE OF TEXAS,
Palo Pinto Land District.

Survey No. 5, Block No. B.

Field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, 1881, situated in Scurry county, on the waters of Colorado, a tributary of the —— river, about — miles from ——, and known as survey No. 5, block No. B: Beginning at a stake, the southeast corner of survey No. 4; thence north at 1,805 cross Colorado river 1,900 varas to a stake; thence east at 670 varas pass north bank Colorado river, 1,900 varas to a stake; thence south 690 varas cross Colorado river, 1,900 varas to a stake; thence west 1,900 varas to the place of beginning. Bearings marked ≡. Surveyed January 17, 1883.

J. H. MILLER,
J. B. PIERCE,
Chain-carriers.

situated in Scurry county, on the waters of ——, a tributary of the Colorado river, about — miles from ——, and known as survey No. 15, block No. B: Beginning at a stake southwest corner of survey No. 14 and northeast corner of survey No. 4; thence west 200 varas cross Colorado river, 425 varas branch C, northeast 1,900 varas to a rock mound; thence north 1,900 varas, a stake; thence east at 880 varas cross Colorado river, 1,900 varas northwest corner of survey No. 14, a stake; thence south 1,900 varas to the place of beginning. Bearings marked ≡. Surveyed January 17, 1883.

J. B. PIERCE,
H. C. REED,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do
128 hereby certify that I have examined the foregoing plat and field-notes, and find them correct, and that they are recorded in my office, in Book P, page 15.

March 14, 1883.

JOEL McKEE,
Surveyor of Palo Pinto Land District.

(1.) File 54848, Bexar scrip, Bacon and Graves' field-notes. Filed March 17, 1883.

—— ——,
Commissioner.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *December* 19, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, hereby certify that the above and foregoing is a true and correct copy of the original, with the endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and affix
[L. S.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner.

Variation, 9° 21′ east; scale, 4,000 varas per inch.

THE STATE OF TEXAS,
Palo Pinto Land District.

Survey No. 16, *Block No. B.*

Field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, A. D. 1881, situated in Scurry county, on the waters of ——, a tributary of the Colorado river, about — miles from ——, and known as survey No. 16, block No. B: Beginning at a rock mound, the southwest corner of survey No. 15 and northeast corner of survey No. 3; thence west 1,900 varas, the northwest corner of survey No. 3, a stake; thence north 1,900 varas, a stake; thence east 1,900
129 varas, northwest corner survey No. 15, a stake; thence south 1,900 varas to the place of beginning. Bearings marked ≡.
Surveyed Jan. 17, 1883.

J. B. PIERCE,
H. C. REED,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-notes, and find them correct, and that they are recorded in my office in Book P, page 16, March 14, 1883.

JOEL McKEE,
Surveyor of Palo Pinto Land District.

File 54849, Bexar scrip, Bacon and Graves' field-notes. Filed March 17, 1883.

——— ———,
Commissioner.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *December* 19, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, hereby certify that the above and foregoing is a true and correct copy of the original, with the endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and affix [L. S.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner.

Variation, 9° 21′ E.; scale, 4,000 varas per inch.

THE STATE OF TEXAS,
Palo Pinto Land District.

Survey No. 17, *Block No. B.*

Field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled "An act to provide for the sale
130 of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, A. D. 1881, situated in Scurry county, on the waters of ——, a tributary of the Colorado river, about — miles from ——, and known as survey No. 17, block No. B: Beginning at a stake, southwest corner of survey No. 16 and northeast corner of survey No. 2; thence west 1,900 varas to a stake, northwest corner of survey No. 2; thence north 1,900 varas to a stake; thence east 1,900 varas, a stake northwest corner of survey No. 16; thence south 1,900 varas to the place of beginning. Bearings marked ≡. Surveyed January 17, 1883.

J. B. PIERCE,
H. C. REED,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office in Book P, page 17, March 14, 1883.

JOEL McKEE,
Surveyor of Palo Pinto Land District.

(1.) File 54850. Bexar scrip. Bacon and Graves' field-notes. Filed March 17, 1883.

—— ——,
Commissioner.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Dec.* 19, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, hereby certify that the above and fore-
131 going is a true and correct copy of the original, with endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and affix
[L. S.] the impress of the seal of said office, the date last above written.

W. L. McGAUGHEY,
Commissioner.

Variation, 9° 21′ east; scale, 4,000 varas per inch.

THE STATE OF TEXAS, }
Palo Pinto Land District. }

Survey No. 18, *Block No. B.*

Field notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, 1881, situated in Scurry county, on the waters of ——, a tributary of the Colorado river, about — miles from ——, known as survey No. 18, block No. B: Beginning at a stake southwest corner of survey No. 17 and northeast corner of survey No. 1; thence west 1,900 varas, northwest corner of survey No. 1, a stake; thence north 1,900 varas, a stake; thence east 1,900 varas, a stake northwest corner of survey No. 17; thence south 1,900 varas to the place of beginning. Bearings marked $\overset{\times}{\equiv}$. Surveyed Jan. 17, 1883.

J. B. PIERCE,
H. C. REED,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-
132 notes, and find them correct, and that they are recorded in my office in Book P, page 18, March 14, 1883.

JOEL McKEE,
Surveyor of Palo Pinto Land District.

(1.) File 54851, Bexar scrip, Bacon and Graves' field-notes. Filed March 17, 1883.

——— ———,
Commissioner.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *December* 19, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, hereby certify that the above and foregoing is a true and correct copy of the original, with the endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and affix [L. S.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner.

Scale, 4,000 varas per inch; variation, 10° east.

THE STATE OF TEXAS, }
Palo Pinto District. }

Survey No. 91, *Block No.* 97.

Field-notes of a survey of 640 acres of land, made for the Houston & Texas Central Railway Company, by virtue of certificate No. $\frac{43}{548}$ issued by the Commissioner of the General Land Office, under an act "to encourage the construction of railroads in Texas by donations of land," approved January 31, 1854, and the amendments thereto, situated in Palo Pinto district, on the waters of Colorado river, about forty miles south $8\frac{1}{2}°$ west from the mouth of Alamo river, and known as survey No. 91 in block No. 97: Beginning at a stake for the northwest corner of No. 90; thence north 1,900 varas to a stake; thence east 1,900 varas to a stake; thence south 1,900 varas to a stake; thence west 1,900 varas to the place of beginning. Bearings marked ≡. Surveyed July 1873.

E. SHAW,
A. LOPEZ,
Chain-carriers.

133 I, J. E. Elgin, deputy surveyor of Jack district, do hereby certify that the foregoing survey was made according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

JOHN E. ELGIN,
Deputy Surveyor, Jack District.

I, W. A. Benson, district surveyor of Jack district, do hereby certify that I have examined the foregoing plat and field-notes and

find them correct, and that they are recorded in my office in Book K, No. 1, page 91.

W. A. BENSON,
District Surveyor, Jack District.

(3.) File 6628. Fannin scrip, Houston & Texas Central Railway Company. Filed in general land office November 26th, 1873.

JACOB KUECHLER.

Correct on map, May 29, 1874.

OTTO GROOS.

C. C. Feb. 12, '74, J. H. H.

AUSTIN, TEXAS, *Dec.* 19, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, hereby certify that the foregoing is a true and correct copy of the field-notes now on file in this office, with endorsements thereon.

In testimony whereof I hereunto set my hand and affix [L. S.] the impress of the seal of said office, the date last above written.

W. L. McGAUGHEY,
Commissioner General Land Office.

Scale, 4,000 varas per inch; variation, 10° east.

THE STATE OF TEXAS, }
Jack District. }

Survey No. 92, *Block No.* 97.

Field-notes of a survey of 640 acres of land, made for the Houston & Texas Central Railway Company, by virtue of cer-
134 tificate No. $\frac{4\,3}{5\,5\,4\,8}$ issued by the commissioner of the general land office, under an act "to encourage the construction of railroads in Texas by donations of land," approved January 31, 1854, and the amendments thereto, situated in —— county, on the waters of the Colorado river, about — miles —— from ——, and known as survey No. 92 in block No. —: Beginning at a stake for the southeast corner of No. 91 and northwest of No. 89; thence north 1,900 varas to a stake; thence east 1,900 varas to a stake; thence south 1,900 varas to a stake: thence west 1,900 varas to the place of beginning. Bearings marked $\frac{N}{S}$. Surveyed July, 1873.

E. SHAW,
A. LOPEZ,
Chain-carriers.

I, John E. Elgin, deputy surveyor of Jack district, do hereby certify that the foregoing survey was made according to law, and that the limits, boundaries and courses, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

JOHN E. ELGIN,
Deputy Surveyor, Jack District.

I. W. A. Benson, district surveyor Jack district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office in Book K, No. 1, page 92.

W. A. BENSON,
District Surveyor, Jack District.

(3.) File 6628. Fannin scrip. Field-notes 640 acres Houston & Texas Central Railway Company. Filed in general land office November 26th, 1873.

JACOB KUECHLER.

Correct on map.

C. C. Feb. 12, '74, J. H. H.

AUSTIN, TEXAS, *December* 10, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, hereby certify that the foregoing is
135 a true and correct copy of the field-notes, with endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and affix
[L. S.] the impress of the seal of said office, the date last above written.

W. L. McGAUGHEY,
Commissioner General Land Office.

Scale, 4,000 varas per inch; variation, 10° east.

THE STATE OF TEXAS, }
Palo Pinto District. }

Survey No. 93, *Block No.* 97.

Field-notes of a survey of 640 acres of land made for the Houston and Texas Central Railway Company, by virtue of certificate No. $\frac{4}{5}\frac{3}{5}\frac{3}{4}\frac{3}{9}$ issued by the commissioner of the general land office under an "Act to encourage the construction of railroads in Texas by donations of lands," approved January 31, 1854, and the amendments thereto. Situated in Palo Pinto district, on the waters of Colorado river, about 39 miles south $5\frac{1}{2}°$ west from the mouth of Alamo river, and known as survey No. 93 in block No. 97: Beginning at a stake for the southeast corner of No. 92 and northwest corner of No. 88; thence north 1,900 varas to a stake; thence east 1,900 varas to a stone mound; thence south 1,900 varas to a stake; thence west 1,900 varas to the place of beginning.

Bearings marked $\overset{\equiv}{\times}$. Surveyed July, 1873.

EUGENE SHAW,
ANTONIO LOPEZ,
Chain-carriers.

I, John E. Elgin, deputy surveyor Jack district do hereby certify that the foregoing survey was made according to law, and that the

limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

JOHN E. ELGIN,
Deputy Surveyor, Jack District.

I, W. A. Benson, district surveyor Jack district, do hereby
136 certify that I have examined the foregoing plat and field-notes, and find them correct, and that they are recorded in my office in Book K, No. 1, page 93.

W. A. BENSON,
District Surveyor, Jack District.

(3.) File 6629, Fannin scrip. Field-notes, 640 acres, Houston & Texas Central Railway Company.

Filed in general land office Nov. 26, 1873.

JACOB KUECHLER.

Correct on map. May 29, 1874.
93.

OTTO GROOS.

C. C. Feb. 12, '74, J. H. H.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Dec.* 19, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a true and correct copy of the original field-notes, with all endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and affix
[L. S.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner General Land Office.

Scale, 4,000 varas per inch; variation, 10° east.

THE STATE OF TEXAS, }
Jack District. }

Survey No. 94, *Block No.* 97.

Field-notes of a survey of 640 acres of land, made for the Houston & Texas Central Railway Company, by virtue of certificate No. $\frac{43}{5549}$ issued by the commissioner of the general land office, under an act "to encourage the construction of railroads in Texas by donations of lands," approved January 31, 1854, and the amendments thereto. Situated —— county, on the waters of Colorado river, about — miles —— from ——, and known as survey No. 94 in block No. 97: Beginning at a stake for the southeast corner of No. 93 and northwest corner of No. 87; thence north 1,900 varas to a stone mound;
137 thence east 1,475 varas cross a creek 1,700 varas cross the Colorado river, 1,900 varas to a stake; thence so-th 9.5 varas

cross the Colorado, 1,900 varas to a stake; thence west 1,900 varas to the place of beginning. Bearings marked $\frac{\equiv}{\times}$. Surveyed July, 1873.

E. SHAW,
A. LOPEZ,
Chain-carriers.

I, J. E. Elgin, deputy surveyor Jack district, do hereby certify that the foregoing survey was made according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

JOHN E. ELGIN,
Deputy Surveyor, Jack District.

I, W. A. Benson, district surveyor Jack district, do hereby certify that I have examined the foregoing plat and field-notes, and find them correct, and that they are recorded in my office in Book K, No. 1, page 94.

W. A. BENSON,
District Surveyor, Jack District.

(2.) File 6629. Fannin scrip. Field-notes 640 acres, Houston & Texas Central Railway Company.

Filed in general land office November 26, 1873.

94. JACOB KUECHLER.

C. C., Feb. 12, '74, J. H. H.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Dec.* 19, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a true and correct copy of the original field-notes, with all endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and affix
[L. S.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner General Land Office.

138 Scale, 4,000 varas per inch; variation, 10° east.

THE STATE OF TEXAS,
Palo Pinto, Jack District.

Survey No. 95, *Block No.* 97.

Field-notes of a survey of 640 acres of land, made for the Houston and Texas Central Railway Company, by virtue of certificate No. $\frac{43}{550}$ issued by the commissioner of the general land office, under "An act to encourage the construction of railroads in Texas, by donations of lands," approved January 31, 1854, and the amendments thereto, situated in Palo Pinto district, on the waters of Colo-

rado, a tributary of —— river, about 39 miles south, 2½° west from the mouth of Alamo river, and known as survey No. 95 in block No. —: Beginning at a stake for the southeast corner of No. 94 and northwest corner of No. 86; thence north 1,805 varas, cross the Colorado river 1,900 varas, a stake; thence east 670 varas, touch north bank of Colorado river, 1,900 varas a stake; thence south 655 varas, cross the Colorado, 1,900 varas a stake; thence west 1,900 varas to the place of beginning. Bearing marked ≡ surveyed July, 1873.

E. SHAW,
A. LOPEZ,
Chain-carriers.

I, Jno. E. Elgin, deputy surveyor, Jack district, do hereby certify that the foregoing survey was made according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

JOHN E. ELGIN,
Deputy Surveyor, Jack District.

I, W. A. Benson, district surveyor, Jack district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office in Book K, No. 1, page 95.

W. A. BENSON,
District Surveyor, Jack District.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a true and correct copy of the original, together with all endorsements thereon, now on file in this office.

139 In testimony whereof I hereunto set my hand and cause the seal of said office to be affixed, this, the 19th day of December, 1891.

[L. S.]

W. L. McGAUGHEY,
Commissioner General Land Office.

3. File 6630, Fannin scrip. Field-notes, 640 acres, Houston and Texas Central Railway Company. Filed in general land office, November 26th, 1873.

JACOB KUECHLER.

Correct on map, May 29, 1874.
95.
C. C. Feb. 12, '74, J. H. H.

OTTO GROOS.

Scale, 4,000 varas per inch; variation, 10° east.

THE STATE OF TEXAS, }
Jack District. }

Survey No. 96, *Block No.* 97.

Field-notes of a survey of 640 acres of land, made for the Houston and Texas Central Railway Company, by virtue of certificate

No. $\frac{43}{550}$ issued by the commissioner of the general land office, under act "to encourage the construction of railroads in Texas by donations of lands," approved January 31, 1854, and the amendments thereto, situated in —— county, about — miles —— from ——, and known as survey No. 106 in block No. —; beginning at a stake for southeast corner of No. 95 and northwest corner of No. 85; thence north 1,245 varas, cross the Colorado, 1,900 varas a stake; thence east 1,900 varas a stake; thence south 1,900 varas to a stake; thence west 1,415, cross the Colorado river, 1,900 to the place of beginning. Bearings marked ≡, surveyed July —, 1873.

E. SHAW,
A. LOPEZ,
Chain-carriers.

I, Jno. E. Elgin, deputy surveyor, Jack district, do hereby certify that the foregoing survey was made according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

JOHN E. ELGIN,
Deputy Surveyor, Jack District.

140 I, W. A. Benson, district surveyor, Jack district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office in Book K, No. 1, page 96.

W. A. BENSON,
District Surveyor, Jack District.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a true and correct copy of the original, together with the endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and cause [L. S.] the seal of office to be affixed this, the 19th day of December, 1891.

W. L. McGAUGHEY,
Commissioner General Land Office.

(2.) File 9630, Fannin scrip. Field-notes 640 acres Houston & Texas Central Railway Company. Filed in general land office November 26, 1873.

JACOB KUECHLER.

Correct on map. 96.
C. C. Feb. 12, '74, J. H. H.

THE STATE OF TEXAS, }
Jack District. }

Survey No. 105, *Block No.* 97.

Field-notes of a survey of 640 acres of land, made for the Houston & Texas Central Railway Company, by virtue of certificate No.

$\frac{43}{555}$ issued by the commissioner of the general land office, under an act "to encourage the construction of railroads in Texas by donations of lands," approved January 31, 1854, and the amendments thereto, situated in Palo Pinto district, on the waters of Colorado river, about 38 miles south, 4° west from the mouth of Alamo river, and known as survey No. 105 in block No. 97: Beginning at a stake for the southwest corner of No. 104 and northeast corner of No. 94; thence west 200 varas, cross the Colorado river 425 varas, cross a branch 1,900 varas a stone mound; thence north 1,900 varas
141 to a stake; thence east 880 varas cross the Colorado, 1,900 varas a stake; thence south 1,900 varas to the place of beginning. Bearings marked ≡. Surveyed July, 1873.

E. SHAW,
A. LOPEZ,
Chain-carriers.

I, John E. Elgin, deputy surveyor Jack district, do hereby certify that the foregoing survey was made according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

JOHN E. ELGIN,
Deputy Surveyor, Jack District.

I, W. A. Benson, district surveyor Jack district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office in Book K, No. 1, page 105.

W. A. BENSON,
District Surveyor, Jack District.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Dec.* 19, 1891.

I, W. L. McGaughey, commissioner general land office of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original field-notes, with all *in* indorsements now on file in this office.

In witness whereof I hereunto sign my name and cause the im-
[L. S.] press of the seal of said office to be affixed, the day and date last above written.

W. L. McGAUGHEY,
Commissioner.

File 6884. Fannin scrip. Field-notes 640 acres Houston & Texas Central Railway Company. Filed in general land office November 20, 1873.

L. E. E. KELLUM, *C. C.*

Correct on map. February 24, 1874.
105

OTTO GROOS.

C. C. Feb. 19, '74, J. H. H.

142 THE STATE OF TEXAS, }
Jack District. }

Survey No. 106, *Block No.* 97.

Field-notes of a survey of 640 acres of land made for the Houston & Texas Central Railway Company, by virtue of certificate No. $\frac{4}{5}\frac{3}{5}\frac{3}{5}$ issued by the commissioner of the general land office, under an act "to encourage the construction of railroads in Texas by donations of lands," approved January 31, 1854, and the amendments thereto, situated in —— county, on the waters of Colorado river, about — miles from —— and known as survey No. 106 in block No. 97: Beginning at a stone mound for southwest corner of No. 105 and northeast corner of No. 93; thence west 1,900 varas to a stake; thence north 1,900 varas to a stake; thence east 1,900 varas a stake; thence south 1,900 varas to the place of beginning. Bearings marked ≡ X. Surveyed July, 1873.

E. SHAW,
A. LOPEZ,
Chain-carriers.

I, John E. Elgin, deputy surveyor Jack district, do hereby certify that the foregoing survey was made according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

JOHN E. ELGIN,
Deputy Surveyor, Jack District.

I, W. A. Benson, district surveyor Jack district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office in Book K, No. 1, page 106.

W. A. BENSON,
District Surveyor, Jack District.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Dec.* 19, 1891.

I, W. L. McGaughey, commissioner general land office of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original field-notes, with all endorsements, now on file in this office.

143 In witness whereof I hereunto sign my name and cause
[L. S.] the impress of the seal of said office to be affixed, the day and date last above written.

W. L. McGAUGHEY,
Commissioner.

File 6884. Fannin scrip. Field-notes 640 acres Houston & Texas Central Railway Company. Filed in general land office November 20, 1873.

L. E. E. KELLUM, *C. C.*

Correct on map, February 24, 1874.
106 OTTO GROOS.

C. C. Feb. 19, '74, J. H. H.

Scale, 4,000 varas per inch; variation, 10° east.

THE STATE OF TEXAS, }
Jack District. }

Survey No. 107, *Block No.* 97.

Field-notes of a survey of 640 acres of land, made for the Houston and Texas Central Railway Company, by virtue of certificate No. $\frac{4}{5}\frac{3}{5}\frac{}{6}$ issued by the commissioner of the general land office, under an act "to encourage the construction of railroads in Texas by donations of lands," approved January 31, 1854, and the amendments thereto, situated in Palo Pinto district, on the waters of Colorado river, about 38 miles south, 7° west from the mouth of Alamo river, and known as survey No. 107 in block No. 97: Beginning at a stake for the southwest corner of No. 106 and northeast corner of No. 92; thence west 1,900 varas, a stake; thence north 1,900 varas, a stake; thence east 1,900 varas, a stake; thence south 1,900 varas to the place of beginning. Bearings marked ≡, surveyed July —, 1873.

E. SHAW,
A. LOPEZ,
Chain-carriers.

I, John E. Elgin, deputy surveyor Jack district, do hereby certify that the foregoing survey was made according to law, and that the limits, boundaries and corners, with the marks, natural
144 and artificial, are truly described in the foregoing plat and field-notes.

JOHN E. ELGIN,
Deputy Surveyor, Jack District.

I, W. A. Benson, district surveyor Jack district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office in Book K, No. 1, page 107.

W. A. BENSON,
District Surveyor, Jack District.

File 6885, Fannin scrip. Field-notes, 640 acres, Houston and Texas Central Railway Company. Filed in general land office November 20, 1873.

L. E. E. KELNER, *C. C.*

Correct on map February 24, 1874.

OTTO GROOS.

C. C. Feb. 19, '74, J. H. H.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Dec.* 19, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, hereby certify that the above and foregoing is a true and correct copy of the original, with the endorsements made thereon, which original is now on file in this office.

In testimony whereof I hereunto set my hand and affix [L. S.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner General Land Office.

Scale, 4,000 varas per inch; variation, 10° east.

THE STATE OF TEXAS, }
Jack District. }

Survey No. 108, *Block No.* 97.

Field-notes of a survey of 640 acres of land made for the Houston and Texas Central Railway Company, by virtue of certificate No. $\frac{4}{5}\frac{3}{5}\frac{}{6}$ issued by the commissioner of the general land office, under an act "to encourage the construction of railroads in Texas, by donations of lands," approved January 31, 1854, and the 145 amendments thereto. Situated in —— county, on the waters of the Colorado river, about — miles —— from —— and known as survey No. 108, in block No. 97: Beginning at a stake for the southwest corner of No. 107 and northeast corner of No. 91; thence west 1,900 varas, a stake; thence north 1,900 varas, a stake; thence east 1,900 varas, a stake; thence south 1,900 varas to the place of beginning. Bearings marked ≡. Surveyed July —, 1873.

E. SHAW,
A. LOPEZ,
Chain-carriers.

I, Jno. E. Elgin, deputy surveyor Jack district, do hereby certify that the foregoing survey was made according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

JOHN E. ELGIN,
Deputy Surveyor, Jack District.

I, W. A. Benson, district surveyor Jack district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office in Book K, No. 1, page 108.

W. A. BENSON,
District Surveyor, Jack District.

File 6885, Fannin scrip. Field-notes, 640 acres, Houston and Texas Central Railway Company. Filed in general land office November 20, 1873.

L. E. E. KELNER, *C. C.*

Correct on map, February 24, 1874.

OTTO GROOS.

C. C. Feb. 19, '74, J. H. H.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Dec.* 19, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, hereby certify that the above and foregoing is a true and correct copy of the original, with endorsements made thereon, which original is now on file in this office.

In testimony whereof, I hereunto set my hand and affix [L. S.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner General Land Office.

146 Variation, 9° 21′ east.

THE STATE OF TEXAS, }
Scurry County. }

Survey No. 94, *Block No.* 97.

Corrected field-notes of a survey of 640 acres, made for the Houston and Texas Central Railway Company, by virtue of certificate No. $\frac{43}{59}$ issued by the commissioner of the general land office under "An act to encourage the construction of railroads in Texas by donations of lands," approved January 31, 1854, and the amendments thereto, situated in Scurry county, on the waters of ——, a tributary of Colorado river, about — miles —— from Snyder, and known as survey No. 94, in block No. 97: Beginning at an earth mound and four pits the southeast corner of survey No. 93, from which a mesquite 3″ dia. bears south 87½, east 41 varas, and do. 3″ dia. bears south 22½, west 38 varas; thence east 1,900 varas to a rock set in ground, the southeast corner, from which two mesquites 3″ dia. bears north 26¾, east 13 varas; thence north at 1,849 varas north bank of said river, 1,900 varas to northeast corner, from which a rock with one end in the ground marked N. W. 95–97 bears north 25 varas and east 94 varas, from which a mesquite 3″ dia. bears north 10½, east 43 varas and a do. 3″ dia. bears south, 75 east; thence west at 60 varas, said north bank 1,900 varas to the northwest corner; thence south 1,900 varas to place of beginning. Bearings marked ⋈. Surveyed October, 1887.

F. S. BAGLEY,
W. B. MOORE,
Chain-carriers.

I, George Spiller, State surveyor, do hereby certify that the foregoing survey was made on the ground, according to law, and the limits, boundaries and corners, natural and artificial, are truly described in the foregoing plat and field-notes.

GEORGE SPILLER,
State Surveyor.

Approved:

R. M. HALL,
Commissioner General Land Office.

(O K.)
ROSENBERG.

(5.) File 6629, Fannin scrip. H. & T. C. R'y Co. cor. F. notes No. 94. Filed May 30, 1888.

R. C. SHELLEY,
Chief Clerk.

C. C. Jan. 28, '91, W. D. B.

147 GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Dec.* 19, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a true and correct coppy of the corrected field-notes, with all the endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and affix [L. S.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner General Land Office.

Scale, 4,000 varas per inch; variation, 9° 21′ east.

THE STATE OF TEXAS, }
Scurry County. }

Survey No. 95, *Block No.* 97.

Corrected field-notes of a survey of 640 acres of land made for the Houston & Texas Central Railway Company, by virtue of certificate No. $\frac{4}{5}\frac{3}{5}\frac{}{0}$ issued by the commissioner of the general land office, under "An act to encourage the construction of railroads in Texas by donations of land," approved January 31, 1854, and the amendments thereto, situated in Scurry county, on the waters of the tributary of Colorado river, about 15 miles south 25° west from Snyder, and known as survey No. 95, in block 97: Beginning at a rock set in ground, the southeast corner of survey No. 94, from which two mesquites 3″ diam. bear north $26\frac{3}{4}$ east, 13 varas; thence east 1,900 varas to a rock set in ground for southeast corner from which a do. 3″ in diameter bears south $80\frac{1}{2}$, east 35 varas and do. 3″ in diam. bear south $\frac{3}{4}$°, west 13.6 varas, and a stake marked N. E. 86 and N. W. 85, bears north $58\frac{1}{2}$, east 26.4 varas; thence north, crossing said river, 1,900 varas to the northeast corner; thence west at 1,320 varas north bank of said river, passing over north point of island, at 1,414 said bank, 1,900 varas to northwest corner, from which a rock with one end in the ground, marked N. W. 95–97, bears north 25 varas and east 94 varas, from which mesquite 3″ diam. bears north $10\frac{1}{2}$, east 43 varas, and do. 3″ diam. bears south,
148 75 east; thence south at 51 varas cross said bank, 1,900 varas to place of beginning. Bearings marked ⋈. Surveyed October, 1887.

F. S. BAGLEY,
W. B. MOORE,
Chain-carriers.

I, George Spiller, State surveyor, do hereby certify that the foregoing survey was made on the ground according to law, and the limits, boundaries and corners, with marks, natural and artificial, are truly described in the foregoing plat and field-notes.

GEO. SPILLER,
State Surveyor.

Approved:

R. M. HALL,
Commissioner of General Land Office.

(O K.)
ROSENBERG.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the above is a true and correct copy of the corrected field-notes, now on file in this office, together with the endorsements thereon.

In testimony whereof I hereunto set my hand and affix
[L. S.] the impress of the seal of said office this 19th day of December, 1891.

W. L. McGAUGHEY,
Commissioner.

(4.) File 6630. Fannin scrip. H. & T. C. R'y Co. cor. f. notes No. 95. Filed May 30, 1888.

R. C. SHELLEY,
Chief Clerk.

C. C. Jan. 28, '91, H. B. D.

Scale, 4,000 varas per inch; variation, 9° 21′ east.

THE STATE OF TEXAS, }
Scurry County. }

Survey No. 96, Block No. 97.

Corrected field-notes of a survey of 640 acres of land, made for the Houston & Texas Central Railway Company, by virtue of certificate No. $\frac{4}{5}\frac{3}{5}\frac{}{0}$ issued by the commissioner of the general land office, under "An act to encourage the construction of 149 railroads in Texas by donations of lands," approved January 31, 1854, and the amendments thereto, situated in Scurry county on the waters of ——, a tributary of the Colorado river, about — miles from Snyder, and known as survey No. 96, in block No. 97: Beginning at a rock set in ground, the southeast corner of survey No. 95, from which mesquite 3″ diam. south 80½ east 35 varas and a do. 3″ diam. bears south ¾ west 13½ varas and a stake marked N. E. 86 and N. W. 85 bears north 58½ east 26.4 varas; thence north, crossing said river, 1,900 varas to northwest corner; thence east, in shinery, 1,900 varas to the northeast corner, from which an earth mound and 4 pits bears north 25 varas and east 80 varas from which mesquite 3″ diam. bears south 79¾ east 138 varas; thence south 1,900 varas to an earth mound and 4 pits in shinery

for southeast corner, from which a mesquite 4″ diam. bears north 86¾° east 133 varas; thence west at 200 varas leave shinery at 1,380 varas east and at 1,420 varas west bank of said river, 1,900 varas to place of beginning. Bearings marked ⊠. Surveyed October —, 1887.

F. S. BAGLEY,
W. B. MOORE,
Chain-carriers.

I, Geo. Spiller, State surveyor, do hereby certify that the foregoing survey was made on the ground, according to law, and the limits, boundaries and corners, with marks, natural and artificial, are truly described in the foregoing plat and field-notes.

GEO. SPILLER,
State Surveyor.

Approved:

R. M. HALL,
Commissioner General Land Office.

(O K.)
ROSENBERG.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the above is a true and correct copy of the corrected field-notes now on file in this office, together with the endorsements thereon.

In testimony whereof I hereunto set my hand and affix
[L. s.] the impress of the seal of said office this 19th day of December, 1891.

W. L. McGAUGHEY,
Commissioner Land Office.

150 (5.) File 6630. Fannin scrip, H. & T. C. R'y Co. Corrected field-notes No. 96.

Filed May 30, 1888.

R. C. SHELLEY,
Chief Clerk.

C. C., Jan. 28, '91. H. B. D.

THE STATE OF TEXAS,
Palo Pinto Land District.

Survey No. 36, *Block No. G.*

Field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto approved March 11, A. D. 1881, situated in Scurry county, on the waters of Gabbits creek, a tributary of the Colorado river, about — miles from ——, and known as sur-

vey No. 36, block No. B: Beginning at a stake the southeast corner survey No. 35; thence north 1,900 varas to a stake; thence east 1,900 varas to a stake, whence a mesquite 5 inches diam., bears south 3′, west 30 varas, do. 5 inches, bears south 58, west 90 varas; thenco south 1,900 varas to stake, whence a mesquite 7 inches, bears south 15, east 105 varas, do. 3 inches bears north 41, east 65 varas; thence north 1,900 varas to the place of beginning. Bearings marked ⌅. Surveyed January 17, 1883.

JERRY PERKINS,
JAMES SELF,
Chain-carriers.

I, E. A. Williams, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

E. A. WILLIAMS,
Deputy Surveyor Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-
151 notes and find them correct, and that they are recorded in my office in Book P, page 153.

March 14, 1883.

JOEL McKEE,
Surveyor Palo Pinto Land District.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Oct.* 31, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a true and correct copy of the original field-notes now on file in this office, and I further certify that survey No. 36, block G, for Bacon and Graves, covers survey No. 243, block 97 for the Houston and Texas Central Railway Company, by virtue of certificate No. $\frac{43}{5\,6\,2\,4}$.

In testimony whereof I hereunto set my hand and affix
[L. S.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner.

(1.) File 54967, Bexar scrip, Bacon and Graves' field-notes. Filed March 17, 1883.

Fee, 75 cents.

——— ———,
Commmissioner.

THE STATE OF TEXAS, }
Jack District. }

Survey No. 243, *Block No.* 97.

Field-notes of a survey of 640 acres of land, made for the Houston & Texas Central Railway Company, by virtue of certificate No. $\frac{4}{5}\frac{3}{6}\frac{3}{2}\frac{}{4}$ issued by the commissioner of the general land office, under an act to encourage the construction of railroads in Texas by donations of lands, approved January 31, 1854, and the amendments thereto, situated in Palo Pinto district, on the waters of Ettas creek, a tributary of Colorado river, about 26 miles south 11 west from the mouth of Alamo river, and known as survey No. 243 in block No. 97: Beginning at a stake for the southeast corner of No. 242 and northwest corner of No. 215; thence north 1,900 varas to a stake; thence east 1,900 varas to a stake from which a mesquite 5 ″ diam. bears south 3 ′ west 30 varas, do. 5 ″ diam. bears south 58 west 90 varas; thence south 1,900 varas to a stake from which a
152 mesquite 7 ″ diam. bears south 15 east 105, do 3 ″ diam. bears north 41° east 65 varas; thence west 1,900 varas to the place of beginning. Bearings marked $\overline{\overline{\times}}$. Surveyed July, 1873.

E. SHAW,
A. LOPEZ,
Chain-carriers.

I, John E. Elgin, deputy surveyor, Jack district, do hereby certify that the foregoing survey was made according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

JOHN E. ELGIN,
Deputy Surveyor, Jack District.

I, W. A. Benson, district surveyor, Jack district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office in Book K, No. 1, page 243.

W. A. BENSON,
District Surveyor, Jack District.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Oct.* 31, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a true and correct copy of the original field-notes now on file in this office, and I further certify that survey No. 243, block 97, for Houston & Texas Central Railway Company by certificate No. $\frac{4}{5}\frac{3}{6}\frac{3}{2}\frac{}{4}$ covers survey No. 36, block G, made for Bacon and Graves.

In testimony whereof I hereunto set my hand and affix
[L. S.] the impress of the seal of said office the date last above written.

W. L. McGAUGHEY,
Commissioner General Land Office.

File 6466. Fannin scrip. Field-notes 640 acres, H. & T. C. R'y Co. Filed November 26, 1873.
Fee, 75c.

JACOB KUECHLER, *C.*

153 Captain SHEPARD testified for the defendants:

I live in Colorado City. I have been living here about eight years. My business is surveying and real estate. I have had occasion to go on block 97. I could not say how often. I suppose about eight or ten times. I suppose there are three or four times I could remember in detail. I do not remember each instance. I have found Elgin's corners on said block 97. I have found them in different localities in the block and in different places at different times. On one occasion I found one in the southern part of the block that runs down into Mitchell county. I do not know that I have ever followed the calls for the streams, except on one occasion, in a general way, on the Colorado river. I could not state exactly how it came about. I find the work as compared with other work done in this locality tolerably well located. I suppose it is next to the T. & P. work. I think the T. & P. work was exceptionally well done. I find that block 97 is about next to that in correctness. I have been able to find the places, etc., called for in the field-notes, but I have not found stakes. Generally where there was a bearing tree I succeeded in finding that. I would not expect to find a stake in the ground now; they mostly have been burnt up by prairie fires. I have found the pile of rocks whenever called for. Mesquite trees are principally used in that country to mark with. As compared with other wood it is strictly a prairie tree. It grows up and then seems to die off and gets dry, and a fire coming along burns it up. I know the Colorado river pretty well, as it runs through this country. I have been on the Colorado river where the lines front upon the river and do not cross it. On the Maverick survey, about 30 miles below here, the lines cease to stop on the river and commence running across. Below here the lines cross the river. All the surveys that I know of above the Maverick that front on the river and do not cross it are the two Peter Smith surveys in Scurry county. I think that is 50-cent land. That is all I know of. The average width of the Colorado river running from block 97 to down here, in my judgment, is not more than 20 feet. It is about 15 or 20 feet. The width of the channel is 100 feet, reckoning from bank to bank. I have seen the river dry for a good distance. Even where the water runs it is not infrequent that you can step across it in summer time. I never took particular occasion to note
154 the distance it was dry. The average width of the river on block 97 is small as compared with the river here. I can only answer the question as to which carries the most water, Deep creek or the Colorado, in this way: When I was there in 1880, meandering the Colorado and Deep creek, there was some doubt as to which was the Colorado and which was Deep creek, as we had got lost. As to which carries the largest volume of water, I do not

know. I believe Deep creek carries the greater amount of water in dry time.

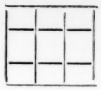
Cross-examined by the State:

I think the character of the water in the Colorado is rather salty. I do not know how the water holes are supplied. The general impression is that there are not many springs in the Colorado. I suppose they are supplied by rain. The character of the bed is sandy. There are no springs that I know of in the river. I do not know where the water comes from, as before stated. I suppose there is some source from which the water comes, probably from the headwaters.

On being asked if he knew anything about an undercurrent spoken of by other witnesses, this witness says he did not hear the other witnesses testify. I have never dug in the Colorado river, but I have dug in the Double Mountain fork of the Brazos and found water. I think Deep creek runs all the year round. From Snyder down, I believe it is a permanent stream of water. I never examined the creek except in winter time. I do not think Deep creek runs through block 97 anywhere. I think it goes entirely through the H. & G. N. surveys. I have not the slightest idea what Etta creek represents. I do not know what the creek is known as now. I did not know that the Jack Elgin field-notes called for Deep creek in block 97. I am telling you what I actually experienced as a surveyor. I believe Deep creek flows into the Colorado about the line of Scurry and Mitchell counties. I expect I could show it to you on that map. Deep creek goes in somewhere, I do not know exactly where. My impression is that this is Deep creek, though it is not platted as Deep creek. I have heard that the town of Sweetwater was built close to a creek by the name of Sweetwater creek. As a surveyor, I do not know that I know of it as such a name as that. I know Bluff creek. I do not know Moore's creek, nor Goffer creek. I know Bull creek. I know Willow creek. I suppose the banks of Bull creek are 50
155 feet wide. The stream is probably 10 feet wide. I do not think it runs throughout the year. When it gets into Borden county the bed of the stream is 10 feet wide. I think Bull creek runs through 97. On looking at the map, said to have been made for Bacon and Graves, and asked to state whether it runs through any of that survey, witness states it appears to be 10 or 12 miles on the map.

Redirect examination by defendants:

I have been on that creek above the town of Snyder. I do not know that I ever found water there or not. I meandered it, and of course was right upon the stream, about 11½ miles above Snyder.



Variation, 9° 21′ east.

THE STATE OF TEXAS, }
Palo Pinto Land District. }

Survey No. 26, *Block No. M.*

Field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, 1881, situated in Scurry county on the waters of Deep creek, a tributary of the Colorado river, about — miles from ——, and known as survey No. 26, block No. M: Beginning at a stake and mound, the southeast corner of survey No. 25; thence north 1,900 varas, a stake and mound; thence east 1,900 varas, a stake and mound; thence south 1,900 varas, a stake and mound; thence west 1,900 varas to the place of beginning. Bearings marked ≡. Surveyed Jan. 22, 1883.

J. B. PIERCE,
H. C. REED,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually
156 made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and they are recorded in my office in Book P, page 434, March 16, 1883.

JOEL McKEE,
Surveyor, Palo Pinto Land District.

THE STATE OF TEXAS, }
County of Palo Pinto. }

I, W. Metcalf, surveyor of Palo Pinto county, do hereby certify that the foregoing plat and field-notes, with the certificates thereto, is a true and correct copy of the records of my office, found on Book P, page 434.

Witness my official signature this November 24, 1891.

W. METCALF,
Surveyor, Palo Pinto County.

(7.) Missing field-notes.

Variation, 9° 21′ east.

THE STATE OF TEXAS, }
Palo Pinto Land District. }

Survey No. 27, *Block No. M.*

Field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, A. D. 1881, situated in Scurry county, on the waters of Deep creek, a tributary of the Colorado river, about — miles, ——, and known as survey No. 27, in block No. M: Beginning at a stake, the southeast corner of survey No. 26; thence north 1,900 varas, a stake and mound; thence east 1,900 varas, a stake and mound; thence south 1,900 varas, a stake and mound; thence west 1,900 varas to the place of beginning. Bearings marked ⩥. Surveyed January, 1883.

157

J. B. PIERCE,
H. C. REED,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-notes, and find them correct, and they are recorded in my office in Book P, page 435.

March 16, 1883.

JOEL McKEE,
Surveyor of Palo Pinto Land District.

THE STATE OF TEXAS, }
County of Palo Pinto. }

I, W. Metcalf, surveyor of Palo Pinto county, do hereby certify that the foregoing plat and field-notes, with the certificate thereto, is a true and correct copy of the records of my office, found on Book P, page 435.

Witness my official signature, this November 24, 1891.

W. METCALF,
Surveyor, Palo Pinto County.

Variation, 9° 21′ east.

THE STATE OF TEXAS, }
Palo Pinto Land District. }

Survey No. 28, Block No. M.

Field-notes of a survey of 640 acres of land made for Elbert
158 M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, A. D. 1881, situated in Scurry county, on the waters of Deep creek, a tributary of the Colorado river, about — miles from ——, and known as survey No. 28, in block No. M: Beginning at a stake and mound, the southeast corner of survey No. 27; thence north 1,900 varas, a stake and mound; thence east 1,900 varas, a stake and mound; thence south 1,900 varas, a stake and mound; thence west 1,900 varas to the place of beginning. Bearings marked ⩥. Surveyed Jan. 22, 1883.

J. B. PIERCE,
H. C. REED,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-notes, and find them correct, and that they are recorded in my office in Book P, page 436, March 16, 1883.

JOEL McKEE,
Surveyor of Palo Pinto Land District.

THE STATE OF TEXAS, }
County of Palo Pinto. }

I, W. Metcalf, surveyor of Palo Pinto county, do hereby certify that the foregoing plat and field-notes, with the certificates thereto, is a true and correct copy of the records of my office, found on Book P, page 436.

Witness my official signature this November 24, 1891.

W. METCALF,
Surveyor, Palo Pinto County.

159 Variation, 9° 21′ east.

STATE OF TEXAS, }
Palo Pinto Land District. }

Survey No. 29, Block No. M.

Field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, A. D. 1881, situated in Scurry county, on the waters of Deep creek, a tributary of the Colorado river, about — miles from ——, and known as survey No. 29, in block No. M: Beginning at a stake, the southeast corner of survey No. 28; thence north 1,900 varas, a stake and mound; thence east at 1,510 varas West prong Deep creek, 1,900 varas, a stake and mound; thence south at 260 varas West prong Deep creek, 1,900 varas, a stake and mound; thence west 1,900 varas to the place of beginning. Bearings marked ⩵. Surveyed January 22, 1883.

J. B. PIERCE,
H. C. REED,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor, Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office in Book P, page 437, March 16, 1883.

JOEL McKEE,
Surveyor, Palo Pinto Land District.

160 THE STATE OF TEXAS, }
County of Palo Pinto. }

I, W. Metcalf, surveyor of Palo Pinto county, do hereby certify that the foregoing plat and field-notes, with the certificate thereto, is a true and correct copy of the records of my office, found on Book P, page 437.

Witness my official signature, this November 24, 1891.

W. METCALF,
Surveyor, Palo Pinto County.

Variation 9° 21′ east.

THE STATE OF TEXAS,
Palo Pinto Land District.

Survey No. 30, *Block No. M.*

The field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled, "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, A. D. 1881, situated in Scurry county, on the waters of Deep creek, a tributary of the Colorado river, about — miles from ——, and known as survey No. 30, in block M: Beginning at a stake and mound, southeast corner survey No. 29; thence north 720 varas Deep creek, 1,400 varas across, 1,640 varas recross same —— creek, 1,900 varas stake and mound; thence east 1,900 varas stake and mound; thence south 1,900 varas stake and mound; thence west 1,900 varas to the place of beginning. Bearings marked ⩥. Surveyed January 22, 1883.

J. B. PIERCE,
H. C. REED,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and
161 corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor, Palo Pinto Land District.

I, Joel McKee, surveyor Palo Pinto land district, do hereby certify that I have examined the forefoing plat and field-notes and find them correct, and that they are recorded in my office in Book P, page 438.

JOEL McKEE,
Surveyor, Palo Pinto Land District.

March 16, 1883.

THE STATE OF TEXAS,
County of Palo Pinto.

I, W. Metcalf, surveyor of Palo Pinto county, do hereby certify that the foregoing plat and field-notes, with the certificates thereto, is a true and correct copy of the records of my office, found in Book P, page 438.

Witness my official signature this November 24, 1891.

W. METCALF,
Surveyor, Palo Pinto County.

Variation 9° 21′ east.

THE STATE OF TEXAS, }
Palo Pinto Land District. }

Survey No. 31, *Block No. M.*

Field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the legislature of the State of Texas, entitled, "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, A. D. 1881, situated in Scurry county, on the waters of Deep creek, a tributary of Colorado river, about — miles from ——, and known as survey No. 31, block No. M, beginning at a stake the southeast corner of survey No. 30; thence north 1,900 varas to stake and mound;
162 thence east 1,900 varas stake and mound; thence south 1,900 varas stake and mound; thence west 1,900 varas to the place of beginning. Bearings marked ⩵. Surveyed January 22, 1883.

J. B. PIERCE,
H. C. REED,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of Palo Pinto Land District.

I, Joel McKee, surveyor Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office, Book P, page 439.

JOEL McKEE,
Surveyor of Palo Pinto Land District.

March 16, 1883.

THE STATE OF TEXAS, }
County of Palo Pinto. }

I, W. Metcalf, surveyor of Palo Pinto county, do hereby certify that the foregoing plat and field-notes, with the certificates thereto, is a true and correct copy of the records of my office, found on Book P, page 439.

Witness my official signature this November 24, 1891.

W. METCALF,
Surveyor of Palo Pinto County.

Variation 9° 21′ east.

THE STATE OF TEXAS, }
Palo Pinto Land District. }

Survey No. 32, *Block No. M.*

Field-notes of a survey of 640 acres of land made for Elbert M. Bacon and Everett G. Graves, by virtue of an act of the 163 legislature of the State of Texas, entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, A. D. 1881, situated in Scurry county, on the waters of Deep creek, a tributary of the Colorado river, about — miles from ——, and known as survey No. 32, block No. M: Beginning at a stake and mound, southeast corner of survey No. 31; thence north 1,900 varas, stake and mound; thence east 1,900 varas, stake and mound; thence south 1,900 varas, stake and mound; thence west 1,900 varas to the place of beginning. Bearings marked ⌅. Surveyed January 22, 1883.

J. B. PIERCE,
H. C. REED,
Chain-carriers.

I, H. M. Berry, deputy surveyor of Palo Pinto land district, do hereby certify that the foregoing survey was actually made in the field, according to law, and that the limits, boundaries and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

H. M. BERRY,
Deputy Surveyor of Palo Pinto Land District.

I, Joel McKee, surveyor of Palo Pinto land district, do hereby certify that I have examined the foregoing plat and field-notes and find them correct, and that they are recorded in my office in Book P, page 439, March 16, 1883.

JOEL McKEE,
Surveyor, Palo Pinto Land District.

THE STATE OF TEXAS, }
County of Palo Pinto. }

I, W. Metcalf, surveyor of Palo Pinto county, do hereby certify that the foregoing plat and field-notes, with the certificates thereto, is a true and correct copy of the records of my office, found on Book P, p. 440.

Witness my official signature this November 24, 1891.

W. METCALF,
Surveyor of Palo Pinto County.

164 AUSTIN, *November* 29, 1892.

Captain W. C. Walsh, commissioner general land office.

MY DEAR SIR: Circumstances of a private nature induce me to tender to you my resignation as assistant draftsman.

In severing my connection with the office allow me to express my gratitude for the appointment, and my appreciation for the uniform courtesy that has ever been extended to me, and I can assure you I will ever hold in grateful remembrance your kindness to me.

Your sincere friend, EVERETT G. GRAVES.

GENERAL LAND OFFICE,
AUSTIN, *Dec.* 19, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the above is a true and correct copy of the original now on file in this office, in letter-file 155,059.

In testimony whereof I hereunto sign my name and cause
[L. S.] the impress of seal of said office to be affixed, day and date last above written.

W. L. McGAUGHEY,
Commissioner.

AUSTIN, TEXAS, *Nov.* 29, 1882.

Mr. E. G. Graves, city.

DEAR SIR: It is with regret that I acknowledge recipt of your resignation as assistant draftsman in this department. During your connection with this office I have ever found you faithful, prompt and accurate, and your resignation will be a loss to the State. In parting permit me to express my high esteem for you as a gentleman and my best wishes for your future success in whatever business you may undertake. Yours truly,

W. C. WALSH, *Com'r.*

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *Dec.* 19, 1891.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the above letter is
165 a true and correct copy of the original now on file in this office.

In testimony whereof I hereunto sign my name and cause
[L. S.] the impress of the seal of said office to be affixed, the date last above written.

W. L. McGAUGHEY,
Commissioner.

Major E. M. BACON, for defendants, testified:

I got no information at all from Mr. Graves with reference to my enterprise. I had no connection with Mr. Graves with reference to my enterprise prior to Mr. Graves' separation from the land office.

I got no information from him at all. The information I got was obtained from other sources, but we had conversations in November about purchasing this land. I prepared the data under which I acted. I made my own search for information. In informing myself as to where to make application for the land I inquired at the land office very particularly as to the proper district, and became satisfied that Palo Pinto was the proper one in which the file should be made. I made efforts to file in Albany, Shackelford county, and tendered my file there, and Mr. Henry C. Jacobs, who was then surveyor, informed me that he could not accept the file and make survey. He refused to accept it. There was nothing said about Shackelford county being constituted a land district. He told me that he was not authorized to take any action in the matter. He said he had no records to make the file. I delivered the field-notes to the land office. We received a receipt from the land commissioner when we filed the field-notes. I do not remember now what was in it. I gave it to Judge Hancock. I am not sure of any efforts being made to find the paper. I was at the treasury when the tender was made. I presume Judge Hancock tendered the paper that I received from the land office. I had given it to Judge Hancock. There was my letter tendering everything to the treasurer with the papers referred to. I was present when Judge Hancock presented same. I do not think he separated the papers at all. I did not see them any further, as I turned everything over to him. I knew he tendered them to Mr. Wortham, the chief clerk. My letter to the treasurer stated the facts as they then existed.

166 On cross-examination witness testified:

I cannot state what particular field-notes were presented to the treasurer, as I cannot remember the numbers now. I have made no search personally in the land office, or caused any to be made, for the papers referred to, but I presume parties representing me have done so. I went to Palo Pinto only once with Mr. Graves. It seems to me that I went to Palo Pinto on the 1st of December, but I am trusting to memory now, and we left Palo Pinto that night and reached Gordon perhaps at 10 o'clock. We remained there until towards morning and I took a freight train, on my way to Shackelford county. I am inclined to think that I went to Palo Pinto again. I was not at Palo Pinto during the month of January, 1883. It is a fact that Mr. Graves and myself left Austin on the 29th or 30th on this mission. Hal Bacon spoken of is my dearly-beloved son.

The State, on rebuttal, adduced the following testimony by B. ISBELL:

I live in Snyder. I have lived in that country for the past three years. I lived in this county from 1877 to that date. I am now county attorney of Scurry county. Prior to that time I was engaged in the cattle and sheep business. I am familiar with the Colorado river as it runs through Scurry county and block 97. I

used to be familiar with the Colorado river. I have not been on it for the last few years. Since I quit the stock business I have not been on the river much. I was familiar with it in 1883. I suppose the river is some sixty feet wide from bank to bank; I never did take trouble to investigate it. Of course that is just a guess. It is very much the same as the river looks here, only not quite so wide. It is one of the chief rivers of the State. It is a permanent stream. Sometimes there is more water in it than at other times. At times it sinks and runs from hole to hole through the sand.

On cross-examination witness testified:

I do not know the average width of the water. As I tell you, it runs through the sand sometimes. I have seen water holes of different widths, some twenty feet to forty feet wide, others not so wide. I do not know what the average would be. It is a matter in which I have no judgment. I do not know exactly where
167 block 97 begins. I do not consider myself a competent witness to say what it would average all along. I am not prepared to say that Deep creek runs more water than the river. Deep creek is a very well-watered creek. Deep creek, when it is not running, has holes probably a little closer than the Colorado. It runs from hole to hole under the sand.

H. A. GOODWIN, for the State, on rebuttal, testified:

The field-notes of the resurvey made by George Spiller, State surveyor, have been furnished the county surveyor of Scurry county by the commissioner of the general land office.

The parties in this suit, having failed to agree upon a statement of facts therein, the foregoing is adopted and approved as a full and complete statement of the testimony in said cause and the clerk of the district court is hereby ordered to file this as a part of the record in the said cause No. 652, The State of Texas *vs.* Bacon and Graves *et al.*

WM. KENNEDY,
Judge Thirty-second District.

THE STATE OF TEXAS
vs.
BACON and GRAVES. } No. 652.

Statement of facts. Filed January 11, 1892.

J. E. HOOPER,
District Clerk, Mitchell County, Texas.

Appeal Bond of Defendants.

In the District Court of Mitchell County, Texas.

THE STATE OF TEXAS
vs.
E. M. BACON, E. G. GRAVES, and C. C. GIBBS. } No. 652.

Whereas, in a proceeding had in the district court of Mitchell county, Texas, cause No. 652, in which The State of Texas brought a suit in trespass, to try title for the recovery of certain lands hereinafter described, as plaintiff, against C. C. Gibbs, trustee, and E. M. Bacon and E. G. Graves, and against The Houston and Texas Central Railway Company, as defendants; and whereas said cause coming on to be heard on the 22nd day of December, A. D. 1891, before the court, the following judgment was pronounced by the court, to wit:

168 In the District Court of Mitchell County, Texas.

THE STATE OF TEXAS
vs.
E. M. BACON *et al.* } No. 652.

On this 22nd day of December, A. D. 1891, came all the parties, and the plaintiff dismissed the cause as to the defendant, The Houston and Texas Central Railway Company, and the plaintiff and the defendants announced themselves ready for trial, and the defendants' general and special exceptions to plaintiff's first amended original petition having been presented and considered, were by the court overruled, and thereupon the plaintiff and defendants announced themselves ready for trial, and neither party demanding a jury, the matters of fact, as well as of law, were submitted to the court, and the court, having heard the pleadings and the evidence and argument of counsel, is of the opinion that the law is for the plaintiff. It is therefore ordered, adjudged and decreed that the plaintiff, The State of Texas, do have and recover of and from the defendants, C. C. Gibbs, trustee, and E. M. Bacon and E. G. Graves, the following-described tract and parcel of land, situated in Scurry, Borden, Fisher, Kent and Howard counties, in the State of Texas, to wit: Beginning at the northeast corner of survey No. 170, block No. 25, H. & T. C. R. R. Co.; thence west 13 miles; thence north 10 miles and 1,727 varas to the northeast corner of survey No. 1, block No. 29, township 5 north, T. & P. R. R. Co.; thence north 77° east with the north line of the Texas and Pacific 80 miles reservation, 28 miles; thence east 7 miles; thence south 3 miles to the southwest corner of survey No. 59, block K, T. A. Thompson; thence east 5 miles to the southeast corner of survey No. 55, block K; thence south 2,700 varas to the northeast corner of survey No. 247, block 2, H. & T. C. R. R. Co.; thence south 75° west 2 miles to the

northeast corner of survey No. 251; thence north 15° west 1 mile to the northeast corner of survey No. 276; thence south 75° west 9 miles to the northwest corner of survey No. 268; thence south 15 east 4½ miles with the west line of block 2; thence south 2 miles; thence west 6 miles; thence south 21 miles; thence west 9 miles to the east line of the Lavacca Navigation Co. surveys; thence north 14 miles to the place of beginning, containing about 550 sections. It is further ordered and adjudged by the court that a writ of restitution and possession in favor of the State of Texas be issued by the clerk of this court to the sheriffs of the counties aforesaid, commanding them to deliver the possession of said land to the plaintiff. It is further ordered and adjudged by the court that The State of Texas, plaintiff, do have and recover of and from the defendants, C. C. Gibbs, trustee, and E. M. Bacon and E. G. Graves, all costs in this behalf incurred, for which let execution issue.

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To all and every part of which judgment the said defendants except, and in open court give notice of appeal to the supreme court of Texas, and upon application made, the parties are granted ten days after adjournment of court in which to prepare and file a statement of facts herein.

It is further ordered by the court that the original maps of the land in controversy be forwarded with the transcript of the record herein.

From which judgment in favor of the State of Texas, the said C. C. Gibbs, trustee, E. M. Bacon and E. G. Graves have taken an appeal to our supreme court; and, whereas, the clerk of the said court has fixed the probable amount of the costs of the suit of both the appellate court and the court below at the sum of five hundred ($500.00) dollars; now, therefore, we, C. C. Gibbs, trustee, and E. M. Bacon and E. Graves, as principals, and —— —— —— ——, as sureties, acknowledge ourselves bound to pay the State of Texas the sum of one thousand ($1,000.00) dollars, conditioned that the said C. C. Gibbs, trustee, and E. M. Bacon and E. G. Graves shall prosecute their appeal with effect, and shall pay all the costs which have accrued in the court below, or which may accrue in the appellate court.

Witness our hands this, the 9th day of January, A. D., 1892.

C. C. GIBBS, *Trustee.*
E. M. BACON.
E. G. GRAVES.
WM. D. CLEVELAND.
C. LOMBARDI.

STATE OF TEXAS, }
Harris County. }

I, C. F. Winkler, clerk of the county court in and for said county of Harris, do hereby certify that C. C. Gibbs, E. M. Bacon, W. D. Cleveland *et al.*, whose names appear signed to the annexed bond, are good and ample security for the amount therein stipulated; and that if said bond was offered to me for approval, the same would be accepted and approved.

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To certify which, I hereunto set my hand and affix the [L. S.] seal of said county court, in the city of Houston, on this 9th day of January, 1892.

C. F. WINKLER,
Clerk County Court, Harris County, Texas,
By GEORGE JONES,
Deputy Clerk.

I hereby estimate the costs in the above cause, both of this and supreme court, at five hundred dollars, and approve the above and foregoing bond, this 13th day of January, A. D. 1892.

J. E. HOOPER,
Clerk District Court, Mitchell County, Texas.

Agreement.

STATE OF TEXAS
vs.
BACON & GRAVES *et al.* } No. —.

Suit pending in the district court of Mitchell county, at Colorado, Texas.

It is agreed by and between the parties to this suit that the following maps, which were introduced on the trial of this cause, certified to under the hand and seal of the commissioner of the general land office, to wit:

The map returned with the Bacon and Graves location, dated 1883; the map of Jack Elgin of block 97, dated 1873; the map of George Spiller, state surveyor, of block 97, dated 1888; also the map attached to G. W. Pressler's depositions, showing the land districts, dated 18—, may be each taken up as original papers, with the transcript, for the inspection of the supreme court, without having the same copied in the record.

C. A. CULBERSON, *Attorney General.*
T. D. COBBS, *Attorney for C. C. Gibbs.*
HANCOCK, SHELLEY & HANCOCK AND
R. H. LOONEY,
Attorneys for Bacon and Graves.

171 STATE OF TEXAS
vs.
BACON & GRAVES *et al.* } No. 652.

Agreement to send up maps. Filed January 22, 1892.

J. E. HOOPER,
Clerk District Court, Mitchell County.

Assignment of Errors.

In the District Court of Mitchell County, Texas.

STATE OF TEXAS
vs.
BACON and GRAVES *et al.* } No. 652.

And now come the defendants in the above-stated cause and assign the following errors, to wit:

1. The court erred in the seventh finding of fact, in finding that the field-notes of sections 26, 27, 28, 29, 30, 31 and 32, of block "M," were never returned to the land office, because the uncontroverted evidence showed that the same had been duly and legally returned to and deposited in the land office within the time required by law. The only statement to the contrary was the certificate of W. L. McGaughey, land commissioner of the State, erroneously admitted, stating that the said field-notes had never been on file in said office, when his depositions showed he had no knowledge of or information of the records of the general land office prior to 1891.

2. The court erred in permitting the State, through her attorney general, to introduce in evidence the certificate of the land commissioner as the only evidence to show that surveys 26, 27, 28, 29, 30, 31 and 32, of block "M," were never returned to the general land office, which is fully shown by bill of exception No. 3, and for the reasons given therein.

3. The court erred in permitting the attorney general to introduce in evidence certified copies of the Bacon and Graves field-notes of surveys 1 and 2, block "B," survey 1, block "G," and survey 1, block "M," and in not requiring him, as demanded by defendants, to produce to be used in evidence certified copies of all the
172 Bacon and Graves field-notes, which the attorney general had in his possession in the court, as shown by bill of exception No. 1.

4. The court erred in its eighteenth finding of fact, in finding that E. G. Graves was an employee in the general land office on the 29th and 30th days of November, 1882, for the evidence shows that he resigned on the 29th day of November, 1882, and that his resignation was accepted on the same day, to wit: the 29th day of November, 1882. And the court also erred in finding that E. G. Graves entered into an agreement with E. M. Bacon to purchase these lands on the 29th and 30th days of November, 1882, for the uncontroverted evidence shows that no such agreement was made until after Graves severed his connection with the land office.

5. The court erred in its twenty-second finding of fact, in finding that the Colorado river ran through about twenty sections of block 97, and in not showing and stating which of the sections of the land sued for and claimed by the defendants in this suit the said river runs through; and also erred in finding that the Colorado river was permanent water.

6. The court erred in its twenty-third finding of fact, in finding that the "Elgin survey of block 97," adopted by the deputy surveyors, Williams and Berry, is not made in conformity to the fifty-cent act of 1879 and its amendments in 1881, as the surveys made on the Colorado river, which is permanent water, cross the same and have a greater frontage thereon than one-half the square of such surveys, because the proof showed that the Colorado river was not permanent water, and also that the water stood in holes in certain places only during the greater part of the year, and failed to show that any particular surveys crossed the river where there was permanent water. And said findings of the court in this respect is unwarranted by the evidence and totally erroneous.

7. The court erred in its twenty-fourth finding of fact, in finding that the $149,320 paid by Bacon and Graves on said lands in January, 1891, to the treasurer, was received by said treasurer under protest, for the uncontroverted evidence of the treasurer is, that he received said money because he was advised to do so by Hon. J. S. Hogg, the then attorney general.

8. The court erred in its fifteenth finding of fact, in finding that Elgin run none of the interior lines in the block, the evi-
173 dence being that he ran many interior lines and established many interior corners.

9. The court erred in its first conclusion of law, in holding that Bacon and Graves were not responsible parties at the time they applied to purchase the land, because that issue had been settled by the surveyor who surveyed the lands and could not again be raised on this trial between the parties at interest.

And because the evidence is conclusive and uncontroverted that Bacon and Graves were responsible parties, as evidenced by the fact that they tendered and offered to pay the full purchase price of all of said lands within the time required by law, to wit: on the 16th and 19th days of May, A. D. 1883, and further that they paid said purchase-money on all of said lands to said treasurer of the State in January, 1891, which said date was the earliest date and the only date on which said treasurer would accept said money.

10. The court erred in its second conclusion of law, in holding that Bacon and Graves failed to comply with the law in not having the survey made as required by law, and therefore could not purchase under the law, because it is not shown in what particular they failed to comply with the law to entitle them to purchase the land, but, on the contrary, said Bacon and Graves did, in every respect and particular, comply with the law in making the proper application and requests of the surveyor to survey the lands, and if not done in all respects and particulars, defendants cannot be made to suffer by the act of the public officer.

11. The court erred in its third conclusion of law, in holding the surveys to be totally incorrect in having a greater frontage on permanent water than is permitted under the acts of 1879 and 1881. First, because it was not shown by the evidence how many surveys crossed the Colorado river at a point where there was permanent water. Second, because if any part of said river had permanent

water, and if any of the surveys crossing the same at such point be for that reason invalid, then it would only affect such surveys and none other.

12. The court erred in its fourth conclusion of law, in holding that Bacon and Graves never paid or offered to pay for said
174 land until long after the expiration of the time allowed and required by law; for that defendants acquired a vested right by the survey of the lands made prior to the repeal of the law of the 14th of July, 1879, and amendments in 1881, and their right to the land could not be impaired by the law being repealed, nor right to pay therefor, nor by any adverse legislation in respect thereto impairing their rights.

13. The court further erred in its fourth conclusion of law, in holding that because "Bacon and Graves did not separate, or offer to separate in their tenders, the surveys made before the repeal from those made after, there was consequently no legal tenders," because the tender of the money was in all respects a lawful and legal tender of the money as required by law for the purchase of the lands, and was in all respects sufficient to pay for those surveyed both prior and subsequent to the repeal of the law, and besides, the same was not refused for the reason given by the court.

14. The court erred in its fifth conclusion of law, in holding that when Bacon and Graves entered into an agreement to purchase the lands, that Graves was an employee of the general land office and prohibited by law from purchasing these lands, because the same is not supported by the evidence, as the uncontroverted evidence showed that Graves resigned his position in the land office on November 29, 1882, and the same was accepted on the same day.

15. The court erred in permitting the attorney general, over the objection of defendants, to introduce in evidence the original deposition of E. G. Graves, taken in another case in another county, in which all of these defendants were not parties, for the reasons given in bill of exception No. 4, which is referred to as a part of this assignment.

16. The court further erred in its sixth conclusion of law, in holding that the State is not bound to return the money paid in January, 1891, to entitle it to a judgment for the land.

17. The court erred in not holding that the State, by putting the lands on the market for sale, and having accepted the purchase-money, is estopped from denying defendants' right to the land, without returning or offering to return the money it has received for the land, as the State cannot, in good conscience and equity, hold the money and the land too and then deny defendants' right to the land.

175 18. The court erred in overruling defendants' general and special exceptions, as contained in defendants' first amended original answer, for the following reasons: 1st, Because the petition does not give any proper description of the land, or state a proper cause of action. 2d, because the same is purely an action in trespass to try title to lands, and for rents, and is such an action as is unknown except by statute; is not afforded to and cannot be main-

tained by the State against a citizen, for the State can neither be ejected or disseized of her land or her public domain. 3d, the petition contained no allegation of fraud or any specific wrongful acts such as would warrant an action for the recovery strictly of the land in the simple statutory form of action provided by statutory law for one citizen to sue another. 4th, because the petition should have been in the nature of a bill in equity, showing the nature and character of plaintiff's claim and defendants' wrongful acts, etc., so that defendants could know and would be put upon notice of what charges they were expected to meet, and not be in total ignorance of the claims which the State, in her sovereign capacity, through her attorney general, might be permitted to raise on the trial of said cause, thus placing the citizen at a great disadvantage in a contest with the State.

19. The court erred in rendering judgment against defendants in this cause under the law and the evidence for the land claimed by them in their answer, and the judgment should have been for defendants; for that the evidence showed that the land had in all respects been legally surveyed for defendants in accordance with law and the rule laid down and established by the decisions of the supreme court of the State of Texas for surveying lands, which had become a rule of property; and because the defendants paid the purchase price for the land, as fixed by the laws of the State of Texas, as soon as the same would be received by the State, and the State having received the money and put it to the same use as all other moneys of the State received for the purchase of lands, under the same law, the State therefore is estopped from denying defendants' right to the land, and ought not to be heard or permitted to recover the land without a return, or offer to return, of the money paid, to wit: $149,320, and the lawful interest thereon from date of payment.

176 All of which assignment of errors are respectfully submitted.

T. D. COBBS,
Attorney for C. C. Gibbs, Trustee.
HANCOCK, SHELLEY & HANCOCK AND
R. H. LOONEY,
Attorneys for Bacon & Graves.

STATE OF TEXAS
us.
BACON & GRAVES *et al.* } No. 652.

Assignment of errors. Filed January 25, 1892.
J. E. HOOPER,
District Clerk, Mitchell County, Texas.

Bill of Costs.

THE STATE OF TEXAS
vs.
BACON & GRAVES *et al.* } No. 652.

Suit pending in district court, Mitchell county, Texas.

Clerk cost, Mitchell county:

	Pl'ff.	Def't.
Docketing cause	....	20
Filing papers	$2 25	$4 35
Orders and judgments	....	1 50
Swearing eighteen witnesses	1 00	80
Oaths with certificate	1 00	
Issuing subpœnaes	2 75	40
Taking bond	....	1 50
Issuing commission to take depositions	75	1 50
7 copies of int'ys with cert. and seal	4 50	2 50
Issuing precepts	6 00	
Final judgment and excess	....	1 25
Taxing cost	....	25
Transcript to supreme court	....	145 00
Certificate to brief	....	75
Clerk's cost, Scurry county	15 00	14 92
Total clerk's cost	$33 25	$174 92

Sheriff's cost:

		Pl'ff.	Def't.
	Summonir witnesses	8 00	1 10
	Serving precepts—Sheriff Mitchell	3 20	
177	Serving precepts—Sheriff Harris	4 00	
	Sheriff Scurry county	10 00	
	Total sheriff's cost		26 20
	Witness attendance	13 20	15 50
	Notaries' fees, paid by plaintiff $6.50; paid by defendant $48.45	15 50	59 95
	Totals	$28 70	$75 45

Total witness and notaries' fees $104 15
Total cost 339 52

I, J. E. Hooper, clerk of the district court of Mitchell county, do hereby certify that the above and foregoing is a true and correct copy of the bill of costs in said cause, incurred in the district court of Scurry and Mitchell counties, as appears of record in my office.

Given under my hand and seal of office in the city of
[L. S.] Colorado, this the 29 day of M'ch, A. D. 1892.

J. E. HOOPER,
Clerk of the District Court of Mitchell County, Texas.

178 *Certificate of Clerk.*

STATE OF TEXAS, }
County of Mitchell. }

I, J. E. Hooper, clerk of the district court in and for Mitchell county, do hereby certify that the foregoing 177 pages of transcript contain a full, true and correct copy of all the proceedings had in that certain cause, No. 652, on the docket of said district court, and entitled The State of Texas *vs.* Bacon and Graves *et al.*, as same appears on file and of record in my office.

Witness my hand and seal of court, at office in the city
[L. S.] of Colorado, Texas, on this the 29th day of M'ch, A. D. 1892.

J. E. HOOPER,
Clerk District Court, Mitchell County, Texas.

THE STATE OF TEXAS, }
County of Tarrant. }

I, W. L. Huff, clerk of the court of civil appeals for the second supreme judicial district of Texas, do hereby certify the foregoing one hundred and seventy-seven pages is a true and correct copy of the original transcript in the case of Bacon & Graves and C. C. Gibbs, appellants, *vs.* The State of Texas, appellee, together with all endorsements, filings, and certificates thereon as the same is on file in said court.

To certify which, witness my official signature and the seal of said court, at office, in the city of Fort Worth, Texas, this the 28th day of August, A. D. 1893.

[Seal of Court of Civil Appeals of the State of Texas.]

W. L. HUFF,
Clerk Court of Civil Appeals,
2nd Supreme Judicial District of Texas.

178*a* (Here follow maps marked p. 178*b*, 178*c*, and 178*d*.)

179 *Proceedings in Supreme Court of Texas Transferring Case.*

Be it remembered, at a term of the honorable supreme court of the State of Texas, begun and holden at Austin on the 3rd day of October A. D. 1892 (present, Hon. John M. Stayton, chief justice, and Associate Justices Gaines and Henry), in cause of—

BACON and GRAVES *et al.*
vs.
STATE OF TEXAS, } No. 8373. Mitchell County.

the following orders were made:

Oct. 3rd, 1892.—Transferred to court of civil appeals, 2nd supreme judicial district. Previous orders.

1892, May 12.—Set for 17th inst.

1892, May 20.—Sub. on briefs and printed arguments for all parties.

1892, May 26.—Sub. set aside, leave to appellants to file supplemental briefs, and resubmitted on briefs for all.

Mo. No. 1282 for leave to file additional authorities.

1892, May 11.—Submitted.

Mo. No. 1283 for precedence. May 11th, 1892.—Submitted.

May 20th, 1892.—Granted.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the foregoing is a true copy of the orders made by this court in the above entitled and numbered cause.

In witness whereof I hereunto set my hand and affix the seal of said court, at Austin, this 3rd day of Oct., A. D. 1892.

CHAS. S. MORSE, *Clerk.*

Filed in court of civil appeals Oct. 4th, 1892.

W. L. HUFF,
Clerk Court of Civil Appeals,
2nd Supreme Judicial District of Texas.

180 BACON & GRAVES *et al.*, Appellants, *vs.* THE STATE OF TEXAS, Appellee. } No. 342. Appeal from Mitchell County.

Conclusions of Fact.

We adopt the finding of facts filed by the court below, except from finding 20 strike out the words "were not responsible parties" and add to finding 24 the following: "By the word 'protest,' as used in this finding, is meant that the treasurer of the State had several times refused to accept this money, and at the time he received it, in January, 1891, the parties paying fully understood that the State would contest their claim to this land, and the treasurer did not receive the money as a legal payment therefor."

Opinion of Court of Civil Appeals.

Opinion.

The subject-matter of this controversy is 466 sections or 298,240 acres of land situated in Scurry, Borden, and adjoining counties.

In 1873 the Houston and Texas Central Railway Company, for the purpose of locating its land certificates thereon, had a large amount of surveying done in Scurry, Borden, Howard, Kent, and Fisher counties. This surveying was done by dividing large blocks of land into sections containing 640 acres each, as will be
181 seen by reference to our conclusions of facts, and was done upon the ground in such way as might under our present law be regarded as work in the fields. The surveying so done by said railway company embraced all of the land in controversy in this suit, but its right thereto failed by reason of the land at that time being within what is known as the Texas & Pacific Railway reservation.

On Dec. 1st, 1882, E. M. Bacon and E. G. Graves made application to the proper surveyors to survey for them a large part of this Houston and Texas Central Railway Company land, embracing that in controversy in this suit, which they desired to purchase under the act of July 14th, 1879, amended March 11th, 1881, which was generally known as the 50-cent act. The surveyor, instead of doing this work upon the ground, simply adopted the work which had previously been done by the railway company and copied their field-notes from the records in his office, and the field-notes so obtained were returned by Bacon & Graves, as to the land in controversy, to the general land office within the time required by the laws above cited. Bacon & Graves, at the time they returned the field-notes, knew how the surveyor had obtained them and that none of the work had been done in the field. The deputies of the surveyor, however, who appeared from the certificates to the field-notes to have done this work, had previously been upon the ground in making other surveys and had seen enough of the railroad work to satisfy them of its correctness.

The act under which Bacon & Graves were attempting to acquire this land provides that "Any person, firm, or corporation desiring to purchase any of the unappropriated land herein set apart and reserved for sale may do so by causing the tract or tracts which said person, firm, or corporation desire to purchase to be
182 surveyed by the authorized public surveyor of the county or district in which said land is situated;" and the question as to whether or not the obtaining of the field-notes in the manner above set forth should be considered as their having had the land surveyed within the meaning of this act constitutes the most important question for our decision in this case.

Prior to the adoption of our revised statutes, in prescribing the manner in which surveys were to be made, our law provided that "The courses of the lines shall be determined by the magnetic needle, and care shall be taken to determine its variations from the pole in the district where the surveys are made. The surveys shall be made with great caution with metallic chains made for the purpose, and care shall be taken that the place of beginning the survey of each parcel of land be established with certainty, taking the bearings and distances of two permanent objects, at least."

Under this law at an early day the practice became so common among surveyors to disregard its provisions by making out field-notes in their offices from data obtained otherwise than by work done upon the ground that the courts in a great number of cases have felt constrained to hold that where the question was raised by subsequent locators or third parties adversely interested such acts on the part of the surveyor would constitute a valid appropriation of the land as against such claims. Horton *vs.* Pace, 9th Texas, 84; Jenkins *vs.* Chambers, 9th Texas, 231; Jones *vs.* Burgett, 46th
183 Texas, 293; Styles *vs.* Gray, 10th Texas, page 506, and in Thompson *vs.* Railway Company, 68th Texas, 392, strong language is used recognizing the adoption of field-notes previously surveyed as being a legal survey within the spirit of our law as it

stood previous to the adoption of our Revised Statutes. At the same time it is not to be denied that to constitute a survey strictly within the terms of our law as it has always been it would be necessary for the work to be done upon the ground in the manner prescribed by the statutes. In Stafford *vs.* King, 30th Texas, 269, it is said: "It is the duty of the surveyor to run round the land located and intended to be embraced by the survey and patent to see that such objects are designated on each as will clearly point out and identify the locality and boundaries of the tract and to extend a correct description of these objects, natural and artificial, with courses and distances into the field-notes of the survey in order that they may be inserted in the patent, which will afford the owner as well as other persons the means of identifying the land that was in fact located and surveyed for the owner;" and in Sanborn *vs.* Gunter, 17 S. W. Rep., 121, it is said: "Actual surveys by which lands granted by the State shall be specifically described and distinguished have always been contemplated and prescribed by our laws. It is true that under the laws in force when the surveys in controversy were made for the railway company it was not always regarded as indispensable, however desirable that the lines of the survey should be actually run and measured on the ground." Recognizing the great inaccuracies that have frequently resulted from the practices of the different surveyors in attempting to make out field-
184 notes in their offices without surveying the land upon the ground, our legislature is adopting the Revised Statutes inserted this provision, art. 3908: "The field-notes of each survey shall state (1) the county or district in which the land is situated; (2) the certificate or other authority under or by virtue of which it is made shall give a true description of same by numbers, dates, when and where issued, name of original grantee and quantity; (3) the land by proper fi*led*-notes with the necessary calls to connections for identification (observing the Spanish measurement by varas); (4) a diagram of the survey; (5) the variations at which the running was made; (6) it shall show the names of the chain-carriers; (7) it shall be dated and signed by the surveyor; (8) the correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same, and also that such survey was actually made in the field, and that the field-notes have been duly recorded, giving book and page; (9) when the survey has been made by a deputy the county or district surveyor shall certify officially that he has examined the field-notes has found them correct, and that they are duly recorded, giving book and page of record."

We think the principal object of the legislature in requiring such strictness in the certificate to be made by the surveyor was to correct the abuse to which the previous law had been subjected as above indicated, and we think it must be conceded if the legislature had the power to condemn what is commonly known as an office survey or office work and to require its officer before parting with the public land of the State to have the survey actually done in the field, it has done so by the passage of this

statute. We know of no case in which the question has
185 been raised as to the validity of an office survey or the adoption of previous field-notes for the survey which should have been made in the field since the adoption of our Rev. Stats., but our supreme court in several cases has given strong intimation that its rulings under previous laws would not apply to such surveys. In Thompson *vs.* Railway Company, 68 Texas, cited above, in which the very strongest language is used in upholding such surveys under previous laws, it is said: "The manner of making surveys was not so specifically prescribed nor the requirement so exacting in the year 1874 as are they by the law now in force, etc." Also Chief Justice Staten, in a dissenting opinion delivered by him in Sanburn *vs.* Gunter, 72 Tex., uses this language: "I do not understand the holding to be that the field-notes returned into the general land office were void because not based on the actual survey of each of the four lines of every section embraced in the block. If such were the holding it would be useless to refer to decisions made under the laws in force prior to the adoption of the Revised Statutes for the purpose of showing that the rulings of this court have in all preceding cases been to the contrary." Also see the opinion of the majority of the court in Sanborn *vs.* Gunter, 17 S. W. Rep., quoted above. In Jumbo Cattle Co. *vs.* Bacon & Graves, 79 Tex., 12, in speaking of what would constitute a survey of this land under the acts of 1879 and 1881, it is said: "We think, too, that the agreed statement shows that they have taken all the steps required of them to perfect their right to the land had these acts remained in force. However improbable it may be that this vast quantity of land could
have been surveyed into sections of 640 acres each within two
186 days we feel bound to follow the explicit agreement that on Jan. 19th and 20th, 1883, the said surveyor of Palo Pinto land district surveyed the land in controversy in two tracts of 640 acres each." It will be borne in mind that the question presented for decision in this case is not whether the field-notes made out as indicated in the first part of this opinion constitute such a survey as the officers of the State could adopt should they see proper to do so, nor whether it is such an absolute nullity as could be taken advantage of by a third party, but the question is, does it constitute such a survey within the meaning of the law as the State can be compelled to accept in opposition to its wishes? The appel-ants are seeking to enforce against the State and executory contract and base their right to do this upon the ground that they have complied with their part of such contract. In such case we think that should show that they have obtained the field-notes in the manner the State said they should be obtained in its proposition, and not that they have got as good field-notes in some other way as would have been obtained had they complied with *with* the State's offer. Had an individual owned this large body of land and had published an offer to sell to any person 640 acres who would have it surveyed by the authorized public surveyor of the county in which the land was situated, and that such surveyor must certify that the work was actually done in the field, we think it would hardly be contended

that the proposed purchaser could file his petition against the owner setting up that the surveyor had copied some field-notes for him from work which had been done by some other surveyor years before, and that by reason of the field-notes thus
187 obtained he had a right to compel the owner to accept such field-notes as a compliance with his offer and to execute a deed for the land embraced therein, and we see no reason why different rules should be applied to the State than that applied to an individual under similar circumstances. We know of no case in which the State as a compliance with an executory contract was held bound against its wishes to accept one of these office surveys even under the old law and still less do we believe that it could be cempelled to accept such field-notes under the laws as it was at the time they surveys purport to have been made. We think the court did not err in overruling appellants' special exceptions to the petition of the State. Appellants have filed an application to purchase lands under the act of 1879, giving the description of their desired purchase substantially as set forth in the petition in this case, thereby showing that they assert claim to that part of the State's land, and we think that they cannot be heard to say that such description was not sufficient in a petition brought to cancel their claim, besides the answer filed by appellants contain a sufficient description of that part of the land embraced in the State's petition, which they claimed and we see no reason why such description would not serve as a basis for the judgment rendered.

We also see no objection to the form of the State's petition. State *vs.* Delesdenier, 7 Texas, 76; State *vs.* Kroner, 2 Texas, 492; Day Land & Cattle Co. *vs.* State, 68 Texas, 535.

We do not now consider it an open question in this State that the State in a suit of this kind is not required to make a
188 tender of the money received by it. State *vs.* Snyder, 66 Texas, 687; State *vs.* Thompson, 64 Texas, 646; State *vs.* Rhomberg, 69 Texas, 220; Randolph *vs.* State, 73 Texas, 485.

It will be seen from the conclusions of fact adopted by us that we are of the opinion that the finding of the court below that Graves was an employee in the land office at the time he entered into the contract with Bacon to acquire this land is supported by the evidence. We think the circumstances disclosed by the record lead to this conclusion and would have justified a finding that before he tendered his resignation Graves & Bacon had come to an understanding as to the terms of their contract, and that Graves resignation was tendered in pursuance of this understanding to enable him successfully to carry out the arrangement that had previously been understood would be made when it might be legally done, but, as what we have said, disposes of all the land in controversy, and as we have not fully decided as to the effect the agreement above indicated would have in a case where all steps presented by the law in the acquisition of the land from the State were taken after the resignation had become complete we have thought it best to express no opinion thereon.

We are of the opinion that the first conclusion of law by the court

below that Bacon & Graves were not responsible parties at the time they applied to purchase this land and could not purchase under the law cannot be sustained. We incline to the opinion that the question of responsibility within the meaning of the act of 1879 was for the surveyor to decide, and if he held them responsible parties and made the survey this would be sufficient to hold the land until the expiration of the time allowed the purchaser in which to make payment. We do not believe it was the policy of
189 the law to restrict such sale to persons who upon investigation of their financial condition would be found able to pay for the land proposed to be purchased out of their own means and thereby preclude those equally worthy who, while not actually owning sufficient property of their own to make the payment, might yet be able in the time allowed to make the necessary financial arrangements. White *vs.* Martin, 56 Texas, 340.

If the court in its third conclusion of law intended to hold that because some of the surveys had a greater frontage of permanent water than is permitted under the law this would invalidate all of the surveys, we do not think the conclusion correct. It will be noted that under this law the land was only to be sold in tracts of 640 acres, and we think that under these provisions each tract must be treated as a separate purchase, and while the sections having such excessive water frontage might be held invalid in so far as it would enable the proposed purchaser to demand title from the State as to them, yet these invalid sections could still be used as a basis to locate and identify the other surveys in the block.

We are also of the opinion that the fourth conclusion of law by the court below, to the effect that Bacon & Graves did not make a sufficient tender, cannot be sustained as to all of the land. As stated above, we think each section must be taken as a separate purchase, and the tender made by them sufficiently identified all sections upon which they proposed to pay, and the fact that they did not make tender upon all of the sections embraced in the field-notes returned by them would only have the effect to invali-
190 date such part of the proposed purchase as was not designated any in their offer to pay. By the decision in Jumbo Cattle Co. *vs.* Bacon & Graves, 79 Texas, we understand it to be settled that the tender was in time, and that the treasurer could not defeat their rights to purchase by refusing to receive their money.

We are of the opinion that the court below erred in omitting the certificate of the commissioner of the general land office to prove that surveys 26, 27, 28, 29, 30, 31, and 32, of block M, were never returned to the general land office. Buford *vs.* Bostwick, 58 Texas, 67. But we are not prepared to say that the evidence outside of this certificate was not sufficient to sustain the finding of the court below that these surveys were never in fact so returned. There was no objection to the certificate of the commissioner to prove that he had made search for the field-notes of these surveys and had been unable to find them in the general land office, and that they were not at the time of making said certificate in their proper places, and we think it quite as probable that these field-notes had been lost or

mislaid before they reached the land office as after, and for this reason the judgment of the court below as to these surveys could be sustained without reference to the objectionable part of this certificate, but as the bill of exceptions shows that the court below must have considered this part of the certificate of the commissioner as important evidence to sustain his finding upon this point, we are of the opinion that were it material in the disposition of the case it would necessitate a reversal as to these surveys.

191 We think what we have said sufficiently disposes of the other assignment of errors made by appellants, and as we find no error in the judgment rendered by the court below we are of the opinion that it should be in all things affirmed.

HEAD,
Associate J.

Opinion rendered Dec. 6th, 1892.

Endorsed: Filed in court of civil appeals Dec. 6, 1892. W. L. Huff, clerk 2nd supreme judicial district.

192 *Judgment of Court of Civil Appeals.*

BACON and GRAVES, Appellants,
vs.
THE STATE OF TEXAS, Appellee. } No. 342.

From Mitchell county.

Judgment.

DECEMBER 6TH, 1892.

Opinion of the court delivered by Mr. HEAD, associate justice:

This — came on to be heard on the transcript of the record, and the same being inspected, because it is in the opinion of the court that there was no error in the judgment, it is therefore considered, adjudged, and ordered that the judgment of the court below be in all things affirmed; that the appellants, C. C. Gibbs, trustee; E. M. Bacon, and E. G. Graves, and Wm. D. Cleveland and C. Lombardi, sureties, pay all costs in this behalf expended, for which let execution issue, and that this decision be certified below for observance.

193 *Appellants' Amended Motion for Rehearing.*

In the Court of Civil Appeals, Second Supreme Judicial District.

BACON & GRAVES *et al.*, Appellants,
vs.
THE STATE OF TEXAS, Appellee. } No. 342.

Walton, Hill & Walton, and R. H. Looney, att'ys for appellants, Bacon & Graves.

194 In the Court of Civil Appeals, Second Supreme Judicial District.

BACON & GRAVES *et al.*, Appellants,
vs.
THE STATE OF TEXAS, Appellee. } No. 342.

Now come the appellants and pray this honorable court to grant them a rehearing in the above-stated cause, for the following reasons, which they here assign as an amended motion for rehearing, in lieu of the motion heretofore filed by them:

I.

The court erred in confounding the adoption of surveys actually made on the ground, with chimney-corner surveys; and in not distinguishing the radical difference between them; and in re-
195 ferring to both classes of surveys indiscriminately as office surveys.

For the evident intention of the legislature in enacting article 3908, was to require and secure actual field-work, by which the lands surveyed might subsequently be identified on the ground; and most certainly that object was secured in the case at bar, for the land was surveyed on the ground by Elgin, and the court found that it had been well surveyed, and Berry & Williams, who adopted the Elgin survey, knew it to have been surveyed on the ground; and that the survey was an accurate survey; for they had run its lines and found its corners on the ground and proven it to be correct before they adopted it for Bacon and Graves.

Certain abuses had grown up among surveyors under the statutes in force prior to the adoption of the Revised Statutes, by which they returned field-notes to the land office without any actual survey of the land having been made on the ground by themselves or by other surveyors. This abusive practice came to be known as office or chimney-corner surveys. Now, it is required by art. 3908, that the surveyor shall certify the correctness of the survey
196 and that it was actually made in the field; so that since the enactment of art. 3908, the certificate of the surveyer must either be false, or the survey must be a correct survey and must have been made in the field.

We submit that it was to condemn and prohibit the return of office or chimney-corner surveys, such as those in controversy in Thompson *vs.* The Railway, and in Sanborn *vs.* Gunter, that art. 3908 was enacted, requiring the surveyor to certify the correctness of the survey and that it was actually made in the field. In Thompson *vs.* The Railway, Chief Justice Stayton says: "One Turnbull without actually surveying the several tracts of land, run such lines as enabled him to correctly make out field-notes of the several tracts of land now in controversy;" *i. e.*, as we understand the facts, Turnbull had run connecting lines from the older surveys on one side of the vacancy to those on the other, and had thereby ascertained the quantity of vacant land. And in Sanborn *vs.* Gunter, a large block of surveys had been put in solely by projection, not a

corner being built, nor a line run upon the ground; and as said by Justice Henry, "Not only was no actual survey of the land
197 pretended to be made but no description of it, accurate or otherwise, was ever acquired in any way. Instead of a survey, an excuse why none was ever made is offered." It was to correct such abuses, that the legislature enacted art. 3908 R. S. and to secure actual field-work, by which the lands surveyed could subsequently be identified; and said article was not enacted to prohibit the adoption of a survey actually made on the ground, and most certainly not to prohibit the adoption of an accurate survey by a surveyor who had himself been upon the ground and had proven the correctness of the survey which he adopted, as in the case at bar.

II.

The court erred in holding that no actual survey of the lands in controversy was ever made as contemplated by law; and in not holding that the surveys in controversy were actually made on the ground according to law; and that they were in contemplation of law, valid surveys and legally appropriated the lands in controversy.

For the surveys in controversy were actually made on the ground, and they were well made. The 16th finding of fact by the
198 court below, is that "said surveys, as far as marked lines and corners were concerned, and in accuracy of work, were equal to or better than any other surveying in that part of the State, except that done for the Texas and Pacific railway, which was unusually accurate;" and that "Deputy Surveyors Berry and Williams had, prior to the adoption of the field-notes for Bacon and Graves, run lines and ascertained corners in blocks 27 and 97 and found them to be as correct as any work of that character in that part of the State, and were satisfied as to the substantial accuracy of said surveys." (See 16th finding of fact, Tr. pages 18 and 19.) Notwithstanding the surveys in controversy were so made, this court holds them invalid and calls them office surveys, whereas an office survey is one made in the office without any surveyor having done any field-work whatever, such as those in controversy in Sanborn *vs.* Gunter, where Justice Henry says: "Instead of a survey, an excuse why none was ever made is offered."

III.

The court erred in citing and approving Stafford *vs.* King and Sanborn *vs.* Gunter, in not holding that all our general laws
199 providing for the disposition of the public domain, both before and after the adoption of the Revised Statutes, have contemplated an actual survey on the ground; and also in not holding that our statutes prior to the adoption of the Revised Statutes were no less imperative or mandatory as to making actual surveys on the ground, than are the statutes in force since the adoption of the Revised Statutes.

IV.

The court erred in not holding that art. 3908, Revised Statutes, was a continuation of the law then in force, with reference to making actual surveys of the ground; and that said article was not a re-enactment of the law then in force, nor the enactment of a new law in reference thereto.

For article 3908 is substantially and in fact the same as the statute and the common law in force prior to the adoption of the Revised Statutes.

Authorities:

Stafford *vs.* King, 30 Texas 271.
Sanborn *vs.* Gunter, 84 Texas 284.
Sayles' Early Laws, vol. 1, page 100, sec. 19, 20 and 21.
Revised Statutes, final title section 19.

200 And in motion for leave to cite additional authorities, the following:

And now come the appellants and move the court for leave to file additional authorities in support of their motion for rehearing in this case. Particularly on the point that subdivision 8 of art. 3908, Rev. Stat., is not the enactment of a new law, but is simply the continuation of the old law as it existed theretofore.

Authorities:

Report of the Commission of Codifiers, vol. 2, Sayles' Civil Stat., pp. 732, 733, 739, 740 and 741; see also Rev. Stat., final title sec. 23.

The report of the commission relating to the revised civil statutes contains the following explanatory statements, which are of the utmost importance in arriving at the legislative intention in enacting article 3908 in so far as it contemplates and requires an actual survey on the ground.

Which said authorities referred to are as follows:

Under title 79, public lands, the commission says:

"The object being to collect under one general head all
201 the laws now in force relating to the disposition and sale of the public domain, and which provide the mode and manner of acquiring titles to land from the State, as distinguished from lands belonging to individuals, it seems more appropriate that the title should be 'the public lands.'

"The commission have left out all land laws, which are now inoperative and which do not furnish a rule of action for the future, and also such as in their judgment ought to be repealed or superseded; and after revising and digesting the laws in force, have arranged the different subjects into twelve chapters, and, as near as may be, in their natural order.

"The material changes are very few, and the more important are here noted as follows:

"1. The different land certificates, which for the most part form the foundation of Texas land titles, are defined and classified, referring in the margin to the laws under which they were issued.

It furnishes in a condensed form the necessary information, and serves to explain what are the different land certificates which are required to be located within five years after April, 1876, and for which duplicates may issue in certain cases.

202 "2. It regulates the mode and manner of making entries and locations, and provides that no survey shall hereafter be made until after entry, etc. This will protect the *bona fide* locator against locations and surveys made in the field of which he could have no notice. It also provides for entries where part of the land lies in another land district.

"3. A pre-emption is a preference right to buy. A donation on condition of three years' residence, etc., is not a pre-emption. Chapter 8 provides for pre-emptions, and furnishes the mode by which a settler may enter 160 acres of land, and may have twelve months' time in which to pay for it, etc. We have followed in some respects the provisions of the United States statutes relating to the same subject, and also relating to homestead donations treated of in another chapter.

"4. We have also furnished more definite rules by which the settler may make entry upon the public domain, and after three years' residence obtain title to a homestead donation.

"5. The provisions of chap. II, page 582, relating to land reservations seems to be all that is necessary to retain on that subject.

203 "The work of the commission under this title was submitted to the commissioner of the general land office for his examination and criticism, and we acknowledge our indebtedness to him for suggestions as to some of the amendments adopted." (See Sayles' Texas Civil Stat. vol. 2, pp. 732–'3.)

And under final title—general provisions—page 739, vol. 2, Sayles' Civil Statutes, the commission says: "Section 19 provides that the Revised Statutes, where substantially the same as the laws now in force, shall not be construed as repealing the latter or as new enactments thereof, but merely as a continuance of them."

And in closing the report, pp. 940–'1, vol. 2, Sayles' Civ. Statutes, the commission says: " * * * * We are under special obligations * * * to the late Commissioner Groos, as well as his successor, Mr. Walsh, * * * without their aid it would have been almost impossible to have prepared in so short a time the titles "archives,' 'county boundaries,' 'public lands,' 'university, school and asylum lands.'

"Such as it is, we now submit the work to you to be laid
204 before the legislature, whose duty it will be to examine and pass upon it. It will be their duty because, under the constitution, they will become responsible for it and become its authors if it goes into force.

"Still, while the constitution and laws make them responsible for the work, and require them to pass upon it, it must be borne in mind that in the nature of things, the time to be devoted by them to that examination, must necessarily be short, and the examination itself, however carefully conducted, unavoidably very imperfect.

"The entire time of a session of the usual length would not suffice for the purpose. And when it is remembered that a great portion of the session must necessarily be consumed in carefully preparing the different and necessary appropriation bills and in providing the ways and means for supplying deficiencies, and supplying funds necessary to meet the actual expenses of the Government for the next ensuing two years, it will at once be seen that the examination of these bills cannot possibly be as complete as it ought to be.

"Recognizing this to be the fact, we have endeavored to adhere, as nearly as possible, to the old law so as to render less
205 arduous the labor of examination. No great or radical changes, therefore, have been made, and no startling or strange innovations in our system have been introduced."

Section 23 of the final title Rev. Stat. reads as follows: "Because this bill cannot be read in one day, or on three several days, and an imperative public necessity exists requiring that the constitutional rule that the same be read on three several days should be suspended, and it is therefore suspended."

V.

The court having found with the court below, that the lands in controversy were actually surveyed on the ground by Elgin, that Berry and Williams had by actual work in the field ascertained that such actual survey had been made, found its corners, run and measured its lines and ascertained it to be an accurate survey; and having held, as contended by appellants, that the laws of Texas, as now, have always required an actual survey on the ground; it was error to hold as this court did that the Elgin survey adopted
206 by Berry and Williams, was not a valid survey and a legal appropriation of the lands in controversy.

For this court in this cause cites and approves Stafford *vs.* King, 30 Texas, and Sanborn *vs.* Gunter, 84 Texas, holding that an actual survey on the ground was required by all our laws prior to the enactment of the Revised Statutes; and it cannot be contended that article 3908, R. S., does more than require an actual survey on the ground; no more and no less than the law in force prior to 1879; and while an actual survey on the ground has ever been required by all our laws, still up to the rendition of the opinion in this cause, there has been one continuous and unbroken line of decisions holding that a valid survey and legal appropriation of the public lands can be made by a surveyor adopting the work of another, where he believes the survey adopted to be a correct survey. Our supreme court has never held a contrary opinion, nor has any one of our many learned justices ever dissented from such an opinion.

The statutes having always as now, required an actual survey on the ground and this court having ever held it competent for
207 a surveyor to make a legal and valid survey by adopting a survey made by another, which he believed to be correct; it would seem there could be no question of the validity or legality of the surveys in controversy, where the surveyors adopted a survey

which the court finds to be one of the best surveyed blocks of land in that locality; a survey which the surveyors not only believed to be correct, but one which they knew by actual ascertainment in the field to be so. Prior to 1879 an inaccurate survey might, under the decisions, be adopted by a surveyor, who believed it to be correct; so it would seem an accurate survey known and ascertained to be correct might now be adopted.

We submit that all our laws as interpreted by our supreme court having required an actual survey on the ground, if a legal survey could ever be made by adopting a previous survey, there is no reason why the same may not be done now since the enactment of article 3908 R. S. requiring the surveyor to certify that the survey was made in the field; which is merely a continuation of the law in force prior thereto.

VI.

208 The court erred in holding in effect that article 3908 R. S. was enacted to condemn and prohibit the adoption of accurate surveys actually made on the ground, by surveyors who had themselves been on the ground and ascertained by running the lines and finding the corners, that an actual and accurate survey had been made on the ground; and in not holding that in enacting said article, the legislative intention was to condemn and prohibit the making of office or chimney-corner surveys.

For had the legislature contemplated the doing of such a useless thing as to resurvey land that had already been actually and accurately surveyed upon the ground, it would have said so in unequivocal and unmistakable terms. To hold that such resurvey was required would, as said by Chief Justice Stayton in Thomson *vs.* The Railway, "be fraught with consequences so grave that nothing short of a statute clearly requiring such a construction would justify it;" for not only have many millions of acres of land been surveyed for individuals by adopting surveys previously made, but some 3,000,000 acres for the common-school fund and the university were
209 thus surveyed by Contractor Thompson and State Surveyor Corwin, under direction of Commissioner Walsh. (See Trans., pages 107 to 110.) We submit that the statute under which Commissioner Walsh authorized Contractor Thompson and State Surveyor Corwin to adopt for the common-school fund and the university surveys already made, does not more than article 3908 authorize the adoption of surveys. Article 4025 R. S. provides for a survey, and article 4026 R. S. requires the surveyor to solemnly swear that he has selected the most valuable lands, and that the field-notes, maps and description of the lands are as correct as he can make them.

This law differs from article 3908 in this only, that the surveys are made by a State surveyor appointed by the commissioner, and not by the duly-authorized county surveyor; that the amount of field-work is specified, that the surveys are returned to and approved by the land commissioner, and not by the county surveyors; and that the State surveyor shall make an affidavit, not a certificate

as county surveyors do, so that the law under which Walsh authorized the survey of this 3,000,000 acres of land by adopting
210 surveys previously made is in fact more specific and exacting in its requirements than article 3908.

And the whole of Greer county, as surveyed by the United States Government, was adopted by State Surveyor Strong, under direction of Commissioner Hall (see Trans., 106), under section 2 of the act of April 2, 1887, page 107; in which we fail to see any discretion given to the commissioner, or to the surveyor, other than that authorized by article 3908. Section 2 of said act, reads as follows:

"SEC. 2. * * * He shall be under the control and direction of the commissioner of the general land office, and under such direction may survey the common-school, university and asylum lands, or other lands in which the State may be interested, and prepare and return field-notes of same, and certify to any and all facts and generally do and perform such official acts as might lawfully be done by a county or district surveyor."

VII.

The court erred in not holding that by reason of the surveys as made, appellants had an executory contract with the State,
211 which entitled them, upon payment of the purchase-money, to the lands in controversy.

For the opinion of this court in this cause ignores a rule of property, and is destructive of the vested rights of appellants, contrary to art. 2, sec. 10, and the 14th article of amendments of the Constitution of the United States, and contrary to the constitution of this State.

The rule of property ignored by this court is, that, an actual survey in the field by an official surveyor may be subsequently adopted by the surveyor who made it, or by any other official surveyor who believes the survey to be a correct survey; and a survey so made becomes the official act of the surveyor who made it by adoption, and is in contemplation of law a valid survey, and a legal appropriation of the public land.

The custom of adopting surveys has been so long and so universally observed by the duly-authorized surveyors of the State, acted upon by the public, and recognized by the decisions of our supreme court, that it has become a rule of property, under which vast property rights have been acquired. Relying upon this rule of property, the State's officers acted in making the surveys in controversy, and upon it depend not only the vested rights of appellants in
212 this cause, but the validity and legality of the survey of millions of acres of land for other citizens are also based upon this rule of property. And should the opinion in this cause be adhered to, our legislature might deem it necessary to cure by a resurvey or by a validating act, the illegality in the survey of three million acres for the common-school fund and the university; and the illegality of Strong's survey of the whole of Greer county.

In view of the grave consequences that would result from the

opinion in this cause if adhered to, it may well be said that "nothing short of a statute clearly requiring such a construction would justify it." And we submit, in the language of Chief Justice Stayton in Thomson *vs.* The Railway, that a legal survey "is a description of land for its identification rather than the actual work done by the surveyor to enable him to give such a description."

VIII.

The court erred in not holding that the presumption of law is, that Berry & Williams in making the surveys in controversy acted under instructions from the commissioner of the general land office; and if in fact no such instructions were given by the
213 commissioner, then the court erred in not holding that no instructions were necessary, and that for that reason none were given by the commissioner; and in not holding that the surveys were properly made in strict accordance with the law and with the rule of property thereunder; and in not holding that art. 3908 was a continuation of the statute then in force; and further, in not holding that said rule of property has, since the adoption of the Revised Statutes, been continuously observed by the surveyors of the State; and acted upon and recognized by the land office, an executive department of the State of Texas.

For section 7 of the sale act is:

"It shall be the duty of the commissioner of the general land office to give such general and specific instructions to surveyors in relation to the surveying of public lands, under the provisions of this act, as may best subserve the interests of the State, and carry into force and effect the intent and purposes of this act."

The presumption must be indulged that the commissioner did his duty and gave instructions, which the surveyors observed in making the surveys in controversy; or if no such instruc-
214 tions were given, that it was because no instructions were necessary; and that appellant's surveys as made were in contemplation of law, legal and valid surveys. This presumption is strengthened by the fact that Walsh gave instructions to Corwin and Thompson to adopt previous surveys of 3,000,000 acres for the common-school fund and the university; and Walsh was justified in believing that by permitting and recognizing the adoption of a survey actually made on the ground, he was thereby carrying into force and effect the intent and purposes of the sale act, and subserving the best interests of the State; for section 9 of the sale act itself provides for and authorizes the commissioner of the general land office to adopt or recognize as legal and valid, surveys made under the provisions thereof that may have become forfeited because of the non-payment of the purchase-money. He is expressly authorized to sell the land so surveyed, to any other person, firm or corporation, who shall pay into the treasury the purchase-money therefor. Section 9 of the sale act reads as follows:

"SEC. 9. Should any applicant for the purchase of public land fail, refuse or neglect to pay for same at the rate of 50 cents

215 per acre within the time prescribed by section 5 of this act, he shall forfeit all right thereto, and shall not thereafter be allowed to purchase the same, but the land so surveyed may be sold by the commissioner of the general land office to any other person, firm or corporation who shall pay into the treasury the purchase money therefor."

It will be observed that the commissioner was authorized to sell the lands so surveyed, and that there is no provision or requirement for a resurvey; the second purchaser was only required to pay the treasurer the purchase-money therefor; and it will also be observed that the State itself, acting by and through its land department, and its treasury department, recognized the even-numbered surveys in controversy as made by Elgin, as correct and accurate surveys; for under the survey as made by Elgin, the land department sold and leased these lands, and the treasury department took the purchase-money therefor. This court will take judicial knowledge of the fact that the State leased the lands as alleged. See statement of facts in Jumbo Company *vs.* Bacon & Graves, 79 Texas, p. 10; and John Moar says:

216 "I bought the land from the State in 1884. I bought one section by being an actual settler on the 1st of January, 1883, at $1.00 per acre." (See Trans. p. 121.) This single section was bought under the $1.00 act approved July 8th, 1879, amended April 5th, 1881.

Justice Gaines says in Jumbo Company *vs.* Bacon and Graves: "In so far as mere property rights are concerned, we see no difference between the contract of the State and an individual and a contract between two individuals. The formalities by which they are entered into may be different, but the principles affecting the two are essentially the same." And referring to the opinion of the court in this cause as to what the court would require of an individual occupying the position of the State in this cause, we must contend that if the individual had been constantly in the land business for a period of fifty years, during which time he had uniformly and without a single exception, recognized the survey upon the ground by one surveyor adopted by another, who believed it to be correct, to be a legal and valid survey, and as full compliance with the stipulations made by him; this court would most

217 certainly, in the case at bar, compel him to convey the lands in controversy, for which he had received the purchase-money; where his stipulations and requirements had been strictly complied with, in this; that the surveys were actually and accurately made on the ground, and that the surveyors who adopted them knew it to have been so done, by actual ascertainment by themselves on the ground.

The court failed to take into consideration the following not only pertinent but material facts:

1. That these field-notes were made out from actual surveys, marked on the ground, and were adopted by surveyors who knew that the work on the ground was not only correct, but definite.

2. The field-notes when returned to the general land office were

received and filed, and were not objected to for any reason, when objections could have been removed or cured.

3. The treasurer of the State, when the purchase-money was tendered, made no objections whatever to the validity of the field-notes, nor the surveys on which they were based; and at last received the purchase-money without making any such objections.

218 Under the assignments of error we submit the following propositions:

1. The uniform construction and interpretation given to a statute by our supreme court, through a period of more than half a century, becomes a rule of property.

2. The rule of property in this cause has all the force and effect of a statute, and is the law of the land.

3. A rule of property cannot be changed or modified except by the enactment of a new statute, which clearly authorizes it to be done.

4. The legislature has not changed the statute as to making actual surveys on the ground, and this court cannot change the rule of property under it.

5. Vested rights acquired by the citizen under a rule of property, must be respected by the sovereign.

6. The citizen is as much bound by a rule of property, as is he by a statute, each is the law of the land, and the State can no more ignore the one than the other.

7. Property rights acquired under a rule of property, are as sacredly vested as if acquired under a statute.

219 8. A rule of property was strictly observed in making the surveys in controversy; and thereby, upon payment of the purchase-money, appellants acquired a vested right, which the State cannot divest.

Hon. C. A. Culberson, attorney of record for appellee, is the present attorney general for the State of Texas, and resides in Austin, Travis county, Texas. Appellants pray that he be served with notice of this application and motion for rehearing.

Wherefore appellants pray for a rehearing of this case, and finally that the judgment of the lower court be reversed and here rendered for appellants.

WALTON, HILL & WALTON AND
R. H. LOONEY,
Attorneys for Appellants Bacon & Graves.

[Stamped:] Filed in court of civil appeals Dec. 21, 1892. W. L. Huff, clerk, 2nd supreme judicial district.

220 In the Court of Civil Appeals of the State of Texas, in the Second Supreme Judicial District, at Forth Worth, 1892.

BACON & GRAVES *et al.*, Appellants,
vs.
THE STATE OF TEXAS, Appellee. } No. 342.

Motion for Rehearing.

By T. D. Cobbs, for appellant C. C. Gibbs, trustee.

221 In the Court of Civil Appeals of the State of Texas, in the Second Supreme Judicial District, at Forth Worth, 1892.

BACON & GRAVES *et al.*, Appellants,
vs.
THE STATE OF TEXAS, Appellee. } No. 342.

Motion for Rehearing.

The appellants now come and pray this honorable court to grant them a rehearing in the above-stated cause, for the following reasons:

I.

The court erred in not holding that the vendees of Bacon and Graves had no knowledge of the fact that the surveys were not actually made on the ground by Berry & Williams for Bacon and Graves; and also in not holding that the State having taken the purchase-money in January, 1891, the appellants thereby acquired a vested right which cannot now be divested, because the State's officers did not resurvey the lands.

222 For the State, by its treasurer, in its written refusal to take the purchase-money in May, 1883, gave as the only reason therefor, that the even-numbered sections of said lands were reserved to the common school fund under the act of February 3, 1883. The field-notes on file in the land office, made by the State's officers, were regular in every particular, disclosed no defects, and the certificate of the surveyors, whose duty it was to survey the lands, showed that said surveys had been made on the ground for Bacon and Graves, in full and strict compliance with law, so that the vendees of Bacon and Graves bought these lands without knowledge of any defect or irregularity, if any existed, in surveying said lands; are innocent purchasers in good faith for value; and having paid the full purchase-money therefor, in January, 1891, they thereby acquired a vested right to the lands in controversy; and the State having received the purchase-money, without giving any intimation to appellants of the existence of any fact, other than the passage of the act of February 3, 1883, as a reason why the purchase-money was not received, cannot now divest the rights of appellants by alleging dereliction of duty on the part of its agents and officers—the surveyors of the Palo Pinto land district.

II.

The court erred in not holding that the surveys made for Bacon and Graves were legal surveys and appropriated the lands in controversy, and gave appellants a vested right thereto; for the lands, to all intents and purposes, were surveyed upon the ground, in accordance with the rule of law fixed and established by the
223 laws of the State of Texas and the decisions of the supreme court construing the same.

III.

The court erred in holding that the surveys in controversy could not be adopted, because there was not in force, at the time these surveys were made, any law or statute providing the manner in which these surveys should be made, other than section 7 of the act of July 14th, 1879, page 49, which provides: "It shall be the duty of the commissioner of the general land office to give such general and specific instructions to surveyors, in relation to the surveying of the public lands, under the provisions of this act, as may best subserve the interest of the State, and carry into force and effect the intent and purposes of this act." And the presumption must be indulged that the surveyors, in making the surveys as aforesaid, followed the instructions of the commissioner of the general land office.

Article 3908, of the Revised Statutes, provided only what the field-notes and the surveyor's certificate thereto should contain, and this article is a continuation of the old law in so far as it required the surveyor to go upon the land and survey the same in the field. The law in force prior to the adoption of the Revised Statutes, requiring the actual survey upon the ground, is not changed by article 3908, and the court should have followed the uniform construction given to the law as it stood prior to the adoption of the Revised Statutes, and should have held that article 3908 was a continuation thereof; and this court should have adhered to, and approved in this cause,
224 the unbroken line of decisions by our supreme court, which established a rule of property permitting surveyors to adopt an actual survey on the ground where they could secure a proper description of the land; and therefore the opinion in this cause, if adhered to, establishes a new rule of property, impairs the obligation of a contract, and is the taking of appellant's property without due process of law.

IV.

It was error to hold that the surveys of Bacon and Graves were not made upon the ground, for the reason that the said lands were originally surveyed on the ground and in the field, for the Houston and Texas Central Railway Company, and also by the deputies who made the surveys for Bacon & Graves.

Subdivision 8, of article 3908, provided that "the correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same, and also that such

survey was actually made in the field, and that the field-notes have been duly recorded, giving the book and page." The surveyors who wrote the field-notes certified to the truth in every particular, as every one understood the law at that time, for the surveys adopted had been made in accordance with law and in the field by the previous surveyor, which was well known to the surveyors for Bacon & Graves.

V.

225 The court erred in holding the law, referred to as adopted by the Revised Statutes, as being more exacting than the old law. Such is not the case. The old law requires the surveys to be carefully made, and for convenience the requirements of the different provisions are paralleled:

Old Law.	*New Law.*
"The surveys shall be made with great caution, with metallic chains made for the purpose, and care shall be taken that the place of beginning the survey of each parcel of land be established with certainty, taking the bearing and distance of two permanent objects at least."	"The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same; and also that such survey was actually made in the field, and that the field-notes have been duly recorded, giving book and page."

The old law not only required accurate surveys, but required the beginning of each parcel of land to be established with certainty, and with two permanent objects at least.

The new law required the surveyor to certify that it was surveyed in the field. The evil which article 3908 was intended to correct was the imperfect manner of surveyors in writing and returning field-notes to the general land office, not that it was intended thereby to pronounce against the decisions of the supreme court in holding that although the law required surveyors to survey land on the ground and establish beginning corners, it was not necessary in all cases to do this; that is, to get two permanent objects for the beginning of each survey, in consequence of so many blocks of surveys made in Texas upon vast plains and prairies. Instead of requiring surveyors to have two permanent objects for beginning, it would be sufficient to have any other object or source of identification.

226 It was not intended to relax the rule that original surveys should be made in the field, but only to obviate the necessity of requiring two permanent objects for the beginning.

The fact that the provision of the law was not incorporated in the Revised Statutes finds its answer in the fact that the proper way to survey lands in Texas was fixed by the decisions of our supreme court, which became a rule of property, never having been changed by any statute.

VI.

The court erred in holding that the Revised Statutes in any manner changed the old law, as shown above, which required surveyors to go upon the ground to make surveys. It only required

the surveyors to put the facts in the field-notes, and the requirement was no more imperative than it had ever been.

The court fails to understand that the surveys which were adopted were made upon the ground by the proper official surveyors, and if surveys could be adopted at all, under any law, ancient or modern, it was certainly proper in this case under the facts.

The effect of the change by the Revised Statutes was not to prevent surveyors from adopting field-notes of surveys previously made by an official surveyor, but to require them to certify that the same were made in a certain way, that is, upon the ground.

Referring to the law prior to the Revised Statutes, this court says: "Under this law, at an early date, the practice became so common among surveyors to disregard its provisions, by
227 making out field-notes in their offices from data obtained otherwise than by work upon the ground, that the courts in a great number of cases have felt constrained to hold that where the question was raised by subsequent locators, or other parties adversely interested, such acts upon the part of the surveyor would constitute a valid appropriation of the land as against such claims," citing authorities.

Here the court concedes that even though surveys not made upon the ground, but in violation of the statute, were voidable, were still sustained by the decisions of the supreme court. Therefore, the legislature in effect drop-ed the statute referred to, and requiring the same provision to be inserted in the field-notes, was a ratification of the old law and an adoption of the construction of the supreme court placed thereupon.

VII.

The court erred in that part of the opinion, holding that the legislature condemned what is commonly known as an office survey, and therefore did condemn such surveys as were made by appellants; for though it did condemn an office survey (which the surveys of appellants are not), still it did not undertake to condemn the right and authority of a surveyor to adopt the survey previously made, as the law requires, and to hold that it could be done now "would be fraught with consequences so grave that nothing short of a statute clearly requiring such a construction would justify it;" and therefore, if the framers of the Revised Statutes had intended such construction to be indulged, a single provision stating
228 that no surveyor should be allowed to adopt the field-notes of any other survey previously made by any official surveyor would have made it plain, and would forever have settled the question without injury to any one.

VIII.

The court erred in not holding that the surveys made for Bacon and Graves were made upon the ground, for they were so made in point of fact.

This honorable court has found correctly that the surveying of the Houston and Texas Central Railway Company "was done upon

the ground;" therefore, the action of the surveyors for Bacon and Graves, in doing what work they did, and writing the field-notes of the surveys so made by them, was in law equivalent to doing the work in the field themselves.

The court has found that "the deputies of the surveyor, however, who appeared from the certificate to the field-notes to have done this work had previously been upon the ground in making other surveys, and had seen enough of the railway work to satisfy them of its correctness;" and the court should have further found they did this work upon the ground themselves, and thus from data obtained by themselves were assisted in making and writing the field-notes for Bacon and Graves, and within the meaning of the law the field-notes thus made constituted a valid appropriation of the land and vested the title thereto in Bacon and Graves.

IX.

The court erred in holding that Bacon and Graves, at the
229 time they returned the field-notes, knew how the surveyors had obtained them, and that none of this work was done in the field.

Neither C. C. Gibbs, as trustee, Judge Hancock, John Maddox, Charles E. Anderson, Frank Hamilton, Frank Maddox, James Johnson, nor E. M. Bacon knew that the surveys had never been made upon the ground.

X.

The court erred in finding that Graves was an employé in the land office at the time he entered into the contract with Bacon to acquire this land, and that such finding was supported by the evidence.

XI.

It was error to consider that part of the deposition of Graves in another case for any purpose, because the admission of the same by the district court, over the objections of appellants, was an error.

XII.

The court falls into an error when it undertook to draw a distinction between what "the officers of the State could adopt should they see proper to do so," in respect to accepting the survey as legal, and "whether it is such an absolute nullity as could be taken advantage of by a third party," or such a survey "as the State can be compelled to accept in opposition to its wishes."

Now, if the officers of the State could accept field-notes and ratify surveys which would thereby become valid, then the State is in no
230 condition to deny to appellants their rights, for here the land commissioner of the State accepted the field-notes, received and receipted for filing fees, and filed the field-notes in his office; and the treasurer accepted the purchase-money and receipted therefor, and the State is thereby concluded.

And second, if the same cannot be attacked by third parties (which is true), then the surveys are simply voidable, and if, as held

by this court, it is an executory contract, then the State was bound to restore the money before she could rescind the contract partially completed and recover the land.

XII.

The court erred in holding that the contract being executory, that is to say, that Bacon and Graves complied with every provision of the contract, except one, and that one was to go upon the ground and resurvey the lands in the field, still, before the State could cancel these surveys, upon the ground that they were illegally made, it was the duty of the State to place the parties *in statu quo*, and to return the money. The legislature convened shortly after the State, through her officers, received the purchase price of the land, and as there was no haste necessary it was but an act of simple justice for the legislature to make an appropriation to return this money in case the State should desire to repudiate the contract and sue for the land. There is no analogy whatever between this case and the cases cited. In the cases cited the parties committed palpable fraud upon the State, and undertook, in violation of the plain provisions of law, to take lands which could not be acquired by them in the manner sought from the State. In this
231 case there was never any pretense that appellants committed a fraud upon the State, and especially is this true as to the vendees of Bacon and Graves. The surveyors surveying the lands for Bacon and Graves simply followed the decisions of the supreme court of Texas, and the custom of all surveyors thereunder, and delivered field-notes made by the deputy surveyors by simply adopting the previous official surveys of the Houston and Texas Central Railway Company, which the court now holds to be incomplete, although the Houston and Texas Central Railway Company's surveys were made upon the ground, yet the court says that the act of appellants in thus securing surveys was an executory contract, such as the State in her sovereign capacity may escape.

XIV.

The evidence in the record of surveyors and land commissioners, showing the custom of surveyors to adopt the field-notes of official surveys previously made, for a period of many years, concurred in by the departments in charge of the surveys of lands in Texas, and the decisions of the supreme court recognizing the custom and right to acquire land in this way, that is, by adopting field-notes made by previous official surveyors, became a property right of appellants; and the deprivation of their property, through a new rule, and through a new construction of the laws of this State in respect thereto, is the taking of their property without due process of law, constitutes an impairment of the obligations of the contract
232 entered into between the State of Texas and appellants, Bacon and Graves, and therefore is in violation of the 10th section of the second article of the Constitution of the United States, which provides: "No State shall pass any law impairing the obligation of contracts;" and in violation of the 14th article of amend-

ments to said Constitution, which provides that "no State shall deprive any person of life, liberty or property without due process of law." And this decision, if adhered to, is violative of the said provisions of the Constitution of the United States, and consequently destroys the vested right of appellants, and is therefore null and void.

XV.

The court erred in not holding that the demurrer to plaintiff's petition should have been sustained. The cases cited by this court are not applicable to this case. In the cases cited it was to recover land to which the State, as sovereign, had never really parted with the title, either legally, morally or equitably. In this case it was to avoid and rescind a contract where defendants had surveyed the land, had the field-notes returned and filed in the land office and the filing fees paid, and had paid the price of their purchase, and by answer set the same out by special pleading; and the State undertook not only to rescind, but to entirely repudiate the contract, and hold the money and also recover the land.

XVI.

The court erred in not holding that there was no proof
233 showing that there was any particular survey which had an excessive frontage on water in violation of law.

XVII.

The court committed an error in changing the findings of fact of the lower court, so as to give to the word "protest" the meaning "that the treasurer of the State had several times refused to accept this money, and at the time he received it, in January, 1891, the parties paying fully understood that the State would contest their claim to this land, and the treasurer did not receive the money as a legal payment therefor," for the treasurer neither received it under "protest," nor refused to receive it at all, and therefore both the court below and this court erred. The Hon. F. R. Lubbock, the then treasurer of the State of Texas, states emphatically that he received the money because he was advised to do so by Hon. J. S. Hogg, the then attorney general; and not one word of "protest" or refusal on his part was offered. See Transcript, page 84, testimony of F. R. Lubbock.

As the court bases its opinion wholly upon the fact that the surveys could not be adopted, it is not necessary to refer to any other question in the record, other than above stated, until after the court grants a rehearing; and appellants do not waive any other ground as an error, wherever the same may be found, but will insist upon the same.

Hon. C. A. Culberson, attorney of record for appellee, is the present attorney general for the State of Texas, and resides in
234 Austin, Travis county. Appellant prays that he be served with notice of this application and motion for rehearing.

Wherefore appellant prays for a rehearing of this case, and finally that the judgment of the lower court be reversed and here rendered for appellants.

T. D. COBBS,
Attorney for Appellant C. C. Gibbs, Trustee.

Filed in court of civil appeals Dec. 17, 1892.

W. L. HUFF,
Clerk 2nd Supreme Judicial Dist.

235 *Order Overruling Motions for Rehearing.*

BACON and GRAVES *et al.*
vs.
THE STATE OF TEXAS. } 225–342.

JANUARY 11, 1893.

This day came on to be heard the amended motion of appellants, Bacon & Graves, for a rehearing herein, which, having been heard and considered by the court, is overruled.

BACON & GRAVES *et al.*
vs.
THE STATE OF TEXAS. } 225–342.

JANUARY 11, 1893.

This day came on to be heard the motion of C. C. Gibbs for a rehearing herein, which, having been heard and considered by the court, is overruled.

Order of Supreme Court of Texas Refusing Writ of Error.

BACON and GRAVES *et al.*
vs.
THE STATE OF TEXAS. } App. No. 24.

From Mitchell County, Second District.

THURSDAY MORNING, *March* 9, 1893.

This day came on to be heard the application of Bacon and Graves *et al.* for a writ of error to the court of civil appeals for the second supreme judicial district, and the same having been duly
236 considered, it is ordered that said application be refused; that the applicants, C. C. Gibbs, trustee, E. M. Bacon, and E. G. Graves, and their sureties, Wm. D. Cleveland and C. Lombardi, pay all costs incurred on this application.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by this court on the application of Bacon & Graves *et al.* for a writ of error.

Witness my hand and the seal of said court this the 13th day of of March, A. D. 1893.

CHAS. S. MORSE, *Clerk.*

Filed in court of civil appeals March 18, 1893.

W. L. HUFF, *Clerk.*

237 *Petition for Writ of Error to Supreme Court of United States.*

E. M. BACON, E. G. GRAVES, and C. C. GIBBS
vs.
THE STATE OF TEXAS.

Petition for writ of error to the judgment of the court of civil appeals for the second supreme judical district of Texas.

To the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States:

Your petitioners, E. M. Bacon, a citizen of Travis county, Texas; E. G. Graves, a citizen of Bexar county, Texas, and C. C. Gibbs, trustee, a citizen of Bexar county, Texas, lately temporarily residing in Harris county, Texas, very respectfully represent that they are aggrieved and injured by the final judgment of the court of civil appeals for the second supreme judicial district of the State of Texas rendered on the 6th day of December, 1892, affirming a final judgment of the district court of Mitchell county, Texas, rendered on the 22nd day of December, 1891, in a suit instituted by The State of Texas, as plaintiff, against your petitioners, as defendants, for the recovery of 550 sections of land situated in Scurry, Borden, Fisher, and Howard counties, in said State, by which said judgment of the said district court the State of Texas had and recovered from your petitioners the title and possession of the said lands.

Your petitioners duly perfected an appeal from the said judgment of the said district court of Mitchell county to the supreme court of Texas as then constituted, which transferred the cause to the second supreme judicial district of the court of civil appeals, which was a court constituted after the said appeal to the said supreme court had been perfected. On December 6, 1892, the
238 said court of civil appeals rendered its final judgment, affirming in all things as aforesaid the said judgment of the said district court, with costs against your petitioners. They duly filed a motion for a rehearing, which was overruled by the said court of civil appeals, and thereupon they duly presented to the supreme court of Texas an application in accordance with law for a writ of error to the said court of civil appeals. The said application was on March 9, 1893, refused by the said supreme court without assigning any reasons for such refusal, thereby leaving in full force the said final judgment of the said court of civil appeals in said suit. The said final judgment of the said court of civil appeals is, therefore, the final judgment in said suit in the highest court of the said State in which a decision on the said suit could be had.

The complete record of said cause under the law is required to be kept in the custody of the said court of civil appeals, and it has never been out of the possession of said court, and petitioners present herewith a transcript thereof as part of this petition.

The petitioners show that in the said suit and proceedings in the said court of civil appeals there was drawn in question the validity

of a statute of and authority exercised under the State of Texas on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of their validity, and that there was drawn in question therein the construction of provisions of the Constitution of the United States and the decision was against the title, right, privilege, or immunity claimed by the petitioners under the said Constitution.

Your petitioners further show that the following state of facts is disclosed by the record in the said suit:

239 By an act of the legislature of Texas approved July 14, 1879, commonly known as "the sales act" or "fifty-cent law," the State of Texas placed upon the market for sale to the public at fifty cents per acre what was known as the "Pacific reservation" and other public lands of said State, and among said lands were those embraced by the said suit of the State of Texas against your petitioners. The said act provided that in order to purchase from the State the lands for sale thereunder the applicant should file an application with the surveyor of the district, requesting him to survey the lands therein described, and if the applicant was deemed by the surveyor a responsible person it became the duty of that officer within a certain stated period of time to survey the lands and to return the field-notes of the surveys to the office of the commissioner of the general land office, and thereafter, within a certain time, the applicant was required to pay to the treasurer of the State fifty cents per acre as the purchase price of the land.

The act declared that after the survey of any of the public domain as thus authorized it should not be lawful for any person to file or locate upon the land thus surveyed.

The said act was amended by an act passed March 11, 1881, but such amendment did not affect the provisions of said act so far as pertinent to this case.

On the 1st day of December, 1882, your petitioners, E. M. Bacon and E. C. Graves, under and in accordance with the provisions of the said act of July 14, 1879, delivered to and filed with the district surveyor of Palo Pinto land district a written application in due legal form to purchase the lands in controversy in said suit, which

240 were offered for sale by and under the said act, and duly requested the said surveyor within whose district the said lands were situate to survey the same for them, as required by law.

The said surveyor duly received, filed, and recorded the said application.

The said lands were accordingly surveyed for the petitioners upon their said application by the said surveyor before the 22nd day of January, 1883, when an act was passed by the legislature of the State of Texas repealing the said "sales act" of July 14, 1879, and the said amendatory act of March 11, 1881.

The said surveyor duly recorded and mapped the field-notes of the surveys of the said lands and duly returned the same to the general land office of the State of Texas, where the same were duly filed, within the period of time fixed therefor by the act of July 14, 1879.

The petitioners duly tendered to the treasurer of the State of Texas the purchase price of the said lands within the time prescribed by the said law.

The petitioners thus took all the steps required by the terms of the said act after the lands were so surveyed (which surveys, as aforesaid, were prior to the repeal of the said act) in order to perfect their right to the said lands and to complete the purchase thereof.

Although the purchase-money was duly and legally tendered, as aforesaid, by the petitioners to the treasurer of the State within the time prescribed by said act, the said treasurer did not accept the same until the 3rd day of January, 1891, when the purchase price of the said lands, amounting to the sum of one hundred and forty-nine thousand one hundred and twenty dollars ($149,120), was received and accepted by the said treasurer, and the said moneys were mingled by him with the other funds of the State and used in the same manner and for the same purposes as other moneys re-
241 ceived as the purchase price of lands sold under said "fifty-cent law."

For the said moneys so paid to and received by the said treasurer as the purchase price of the said lands receipts in the usual form were duly executed by that officer to the petitioners.

After the receipt of the purchase-money of said lands, to wit, on November 27, 1891, the State of Texas brought the said suit against your petitioners for the said lands, and judgment was rendered as aforesaid by the said district court of Mitchell county against your petitioners in the said suit for the title and possession of the same, with costs, and the said judgment was in all things affirmed as aforesaid by the said final judgment of the said court of civil appeals made and rendered on the 6th day of December, 1892.

By the said final judgments of its judicial courts the State of Texas has thus recovered the said property from your petitioners while holding and retaining the purchase-money for the same so paid to it by your petitioners.

The petitioners further show that they specially set up and claimed in the said suit that by their said application to purchase the said lands and the said survey of the same as made they acquired a vested right to purchase and pay for the said lands under the said "sales act" of July 14, 1879, so as to bind the State, which could not be impaired by the repeal of the said act, and that the said act of January 22, 1883, so far as the same affects the petitioners' said contract right and vested interest in the said lands as claimed, is null and void as repugnant to article I, section 10, of the Constitution of the United States, protecting the obligation of contracts against impairment by State legislation.

242 The petitioners, in their answer in the said cause, averred that to permit the State of Texas to deprive them of the said lands so purchased and paid for by them, and in which they have a vested right, would be in violation of the Constitution of the United States, and impair and destroy the obligation of the contract between the State of Texas and the petitioners. They also specially claimed in said answer as follows:

"That the defendants having in all respects fully complied with the provisions of the law in respect to the purchase of said lands, under which said lands were offered for sale by the plaintiff, their rights thereto become and were vested, and the act of the legislature subsequent thereto repealing said law was under article I, section 10, sub., 1 of the Constitution of the United States null and void as affecting defendants' vested right."

The petitioners, in their assignment of errors on appeal to the said court of civil appeals, also claimed that the district court erred in its conclusions of law, "for that defendants acquired a vested right by the survey of the lands made prior to the repeal of the law of the 14th of July, 1879, and amendments in 1881, and their right to the land could not be impaired by the law being repealed nor right to pay therefor nor by any adverse legislation in respect thereto impairing their rights."

Petitioners thus say that there was drawn in question in the said suit in the district court and in the court of civil appeals the validity of the said act of the legislature of the State of Texas passed January 22, 1883, repealing the said "sales act" of July 14, 1879, upon the ground that the said act violated the obligation of the contract between the State of Texas and the petitioners in respect to the purchase of the said lands, which was set up and asserted by the petitioners in the said suit, and impaired the vested rights of the petitioners under the said contract, and that the decision of
243 the said court of civil appeals upheld and sustained the validity of the said act of January 22, 1883, as against the petitioners and the rights claimed under the said contract set up by the petitioners, and thus denied to the petitioners the right which they maintained in the said suit was secured to them by that provision of the Constitution of the United States which declares that "no State shall pass any law impairing the obligation of contracts."

Your petitioners further represent that in the said suit and proceedings on appeal in the said court of civil appeals there was drawn in question the construction and effect of provisions of the Constitution of the United States, and that the decision of the court of civil appeals therein was against the right, privilege, and immunity claimed by the petitioners under the Constitution of the United States.

The petitioners show that at the time the said surveys of the said lands were so made for them, and the field-notes thereof were returned to and filed in the general land office of the State of Texas, and the purchase-money for the said lands was so paid by the petitioners to the State of Texas, it was a rule of property in Texas, by a continuous and unbroken line of decisions of the supreme court of that State during a period of nearly fifty years, that a valid survey and legal appropriation of the public lands could be duly made by an official surveyor copying or adopting the field-notes of a prior survey made by another official surveyor where the surveyor be-

lieved such previous survey to be a correct survey of the lands, as is shown by the adjudications in the following cases:

Horton *vs.* Pace, 9 Texas, 84.
Jenkins *vs.* Chambers, 9 Texas, 231.
Styles *vs.* Gray, 10 Texas, 504.
Chadoin *vs.* McGhee, 20 Texas, 481.
244 Jones *vs.* Burgett, 46 Texas, 293.
Lapsley *vs.* Spencer, 20 Howard, 272.
Doswell *vs.* De La Lanzo, *id.*, 33, and Texas authorities cited.

The supreme court of Texas, in the case of Horton *v.* Pace (9 Texas, 84), said:

"We do not question the surveyor's right to adopt a previous survey that he thinks correct."

In Styles *v.* Gray (10 Texas, 506) the same court said:

"Suppose that the survey had been made upon a certificate which was afterwards raised or on one found to be invalid. There could be no sort of objection to the surveyor's applying his work to a good and valid certificate previously located. It would be worse than useless to require him to do his work over again when he could verify its correctness without such useless labor and expense."

The doctrine is recognized by the Supreme Court of the United States as the settled law of Texas in the cases of Lapsley *v.* Spencer (20 Howard, 272) and Doswell *vs.* De La Lanzo (*ibid.*, 33).

The surveys of the lands in controversy made for the petitioners upon their said application to purchase the same under the "sales act" of July 14, 1879, were made under and in accordance with the said rule and decisions of the supreme court of Texas by the surveyor writing the field-notes from the field-notes of a previous survey of the lands duly recorded in his office, which he knew to be correct from work done by him in the field and upon the ground in verifying such previous survey.

The facts of the case showed that the field-notes of the said surveys made for the petitioners described the lands in tracts of 640 acres each, and were written up, signed, and dated by the surveyor making the said surveys prior to January 22, 1883, the date of the repealing act; that the field-notes were duly recorded by the surveyor in his office and were returned to and filed in the general land office with a map of the land within the time prescribed
245 by the said act of July 14, 1879, and that due tender of the purchase-money was made by the petitioners to the State of Texas within the time fixed by the provisions of the said act.

Under said rule and decisions of the supreme court of Texas the said surveys were good and valid surveys and a legal appropriation of the lands in controversy upon the said application of petitioners to purchase the same under the said sales act of 1879, which entitled them, upon the payment of the purchase-money, to the said lands.

The petitioners claimed in said suit and proceedings on appeal that the said transactions constituted a legal and valid contract for the purchase of said lands between the State of Texas and petition-

ers which no action of the courts of the State could lawfully impair or invalidate by changing or altering the then settled judicial construction of the law in relation to surveys of the public domain, and that to so deprive them of said lands would be in violation of the Constitution of the United States.

Under and by virtue of article I, section 10, of the Constitution, declaring that no State shall pass any law impairing the obligation of contracts, and article XIV, section 1, of the amendments of the Constitution, prohibiting any State from depriving any person of property without due process of law, the settled construction of the law of Texas in relation to surveying the public land at the time of said transactions between the State of Texas and the petitioners entered into the same and governed the rights and obligation of the said parties, and the rights vested in petitioners under such then existing construction of the said law as aforesaid cannot be lawfully divested, under the Constitution of the United States, by a subsequent decision of a court of the State changing the construc-
246 tion of the said law or declaring a new or inconsistent rule and holding a contract invalid which was valid under the law as construed and understood at the time the same was made.

Your petitioners aver and show that the said decision and judgment of the said court of civil appeals sought to be brought in review by the Supreme Court of the United States involve questions necessarily arising under the Constitution of the United States and raised and presented by the record; that the said decision and judgment of the said court changed and altered the settled construction of the law of Texas as to such surveys of the public land as it existed at the times of the said transactions between the State of Texas and petitioners in relation to the lands in suit, and held and adjudged that the said surveys of petitioners which were valid surveys and a legal appropriation of said lands under the law of Texas, as previously construed as aforesaid and as understood at the times of said transactions, were not valid surveys and did not legally appropriate the lands in controversy and did not entitle petitioners to said lands upon the payment and receipt of the purchase-money therefor as aforesaid, and that the said decision and judgment of the said court of civil appeals impair and destroy the validity and obligation of the said contract between the State of Texas and the petitioners under the Constitution of the United States, and constitute in law a denial by the State of due process of law, and are retroactive in their effect and unconstitutional.

Your petitioners therefore pray that a writ of error may be allowed herein to the said judgment of the said court of civil appeals for the second supreme judicial district of the State of
247 Texas rendered in said suit on the 6th day of December, 1892, to the end that the said judgment may be reviewed and reversed.

BACON AND GRAVES,
C. C. GIBBS, *Trustee*,
By WALTON, HILL AND WALTON.
T. D. COBBS AND
J. HUBLEY ASHTON,
Attorneys and Counsel for Petitioners.

(Endorsed:) E. M. Bacon, E. G. Graves, and C. C. Gibbs *vs.* State of Texas. Petition for writ of error to the judgment of the court of civil appeals of the State of Texas. Filed in court of civil appeals Oct. 31, 1893. W. L. Huff, clerk 2nd supreme judicial district.

248 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the court of civil appeals for the second supreme judicial district of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between E. M. Bacon, E. G. Graves, and C. C. Gibbs, trustee, appellants, and The State of Texas, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties
249 aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of October, in the year of our Lord one thousand eight hundred and ninety-three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

Without a supersedeas.

(Endorsed:) E. M. Bacon, E. G. Graves, and C. C. Gibbs *vs.* The State of Texas. Writ of error. Filed in court of civil appeals Oct. 31, 1893. W. L. Huff, clerk 2nd supreme judicial district.

I hereby certify that a copy of foregoing writ of error is lodged in this office for defendant in error.

W. L. HUFF,
Clerk of the Court of Civil Appeals,
2nd Supreme Judicial District.

250 *Citation on Writ of Error & Return.*

UNITED STATES OF AMERICA, *ss:*

To the State of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of civil appeals for the second supreme judicial district of the State of Texas, wherein E. M. Bacon, E. G. Graves, and C. C. Gibbs, trustee, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 20th day of October, in the year of our Lord one thousand eight hundred and ninety-three.

STEPHEN J. FIELD,
Associate Justice Supreme Court of the United States.

251 On this 1st day of November, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared I. V. Davis before me, the subscriber, a credible citizen, having no interest in this suit, and makes oath that he on this day delivered a true copy of the within citation to Frank Andrews, who is in charge of the attorney general's office and first office assistant of the attorney general, as Hon. C. A. Culberson, attorney general, is absent from the State and it is not known when he will return to the State, and by further delivering a copy of this citation on the same day to Hon. J. S. Hogg, governor of the State of Texas.

I. V. DAVIS.

Sworn to and subscribed the 1st day of November, A. D. 1893.

J. H. HENDESON,
Notary Public in and for Travis County, Texas.

On this the second day of November, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared G. W. Eason before me, a deputy United States marshal of the eastern district of Texas, who, having no interest in this suit, *and* makes oath that he on this day delivered a true copy of the within citation

to R. L. Henry, the assistant attorney general of the State of Texas, one of the attorneys of record to the within-stated suit and who, *is* by virtue of his office, in the absence of the attorney general (who is now out of the State), performs the duties of that office during his absence.

G. W. EASON,
Dep'ty U. S. M., E. D. of Texas.

252 Sworn to and subscribed before me this the 2nd day of November, A. D. 1893.

D. W. PARISH,
Clerk of the United States District Court for the Eastern District of Texas, at Tyler, Texas.

Service of the within writ accepted this Nov. 4th, 1893.

C. A. CULBERSON,
Att'y Gen. of Texas.

253 And thereafter, to wit, November 11th, 1893, the plaintiffs in error filed their assignment of errors as follows:

Assignment of Errors.

E. M. BACON, E. G. GRAVES, *et al.*, Plaintiffs in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

And now come E. M. Bacon, E. G. Graves, and C. C. Gibbs, trustee, the plaintiffs in error, and assign the following errors committed in the proceedings had below:

I.

The court of civil appeals erred in deciding that the act of the legislature of the State of Texas entitled "An act to withdraw the public lands of the State of Texas from sale," approved January 22, 1883, is not repugnant to the Constitution of the United States in that the said act did not impair the obligation of a contract between the State of Texas and the plaintiffs in error in respect to the lands in controversy in this suit and the purchase thereof under the act of the legislature of Texas entitled "An act to provide for the sale of the unappropriated domain of the State of Texas and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto approved March 11, 1881, and in not holding
254 that the said act of the legislature of Texas approved January 22, 1883, is repugnant to the Constitution of the United States in that the said act impaired the obligation of a valid contract for the purchase of the said lands between the State of Texas and the said appellants, arising under and created by the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881.

II.

The court of civil appeals erred in deciding that the said plaintiffs in error, E. M. Bacon and E. G. Graves, had not a valid contract with the State of Texas to purchase the said lands under the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881, the obligation of which was impaired by the said State by the said acts of the legislature thereof approved January 22, 1883.

III.

The court of civil appeals erred in deciding that the said plaintiffs in error had no vested interest in the said lands under and by virtue of the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881, which was impaired or affected by the said act of the State of Texas approved January 22, 1883, and in not adjudging that the said plaintiffs in error, under the said acts approved July 14, 1879, and March 11, 1881, had acquired a vested right and interest in the said lands by contract with the State of Texas, within the protection of the Constitution of the United States, which was impaired by the said act of the State of Texas approved January 22, 1883, in contravention of the said Constitution.

255 IV.

The court of civil appeals erred in not deciding that the plaintiffs in error, E. M. Bacon and E. G. Graves, by their application to purchase the lands in controversy under the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881, and the surveys of the same as made for them by the official surveyors before the passage by the said legislature of the said act approved January 22, 1883, and recorded in the office of the district surveyor and returned to the general land office of Texas, acquired a vested right in the said lands and a valid contract with the State of Texas for the purchase of the same under the said act of July 14, 1879, which the legislature of the State could not lawfully take away and impair by the repeal of the said act in and by the said act approved January 22, 1883.

V.

The court of civil appeals erred in not deciding that the plaintiffs in error had the right to pay the amount of the purchase price for the said lands after and notwithstanding the passage of the said act of the legislature of Texas approved January 22, 1883, which could not be defeated or affected by the refusal of the treasurer of the State of Texas to receive the same as tendered within the time prescribed by the said act of July 14, 1879, and in not deciding that after such tender and payment of the said purchase-money as made by them the State of Texas could not have and recover from the plaintiffs in error the lands in controversy in this suit.

256 VI.

It appearing by the record that the field-notes of said surveys, as made for the said plaintiffs in error upon their application to purchase the said lands under the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881, described the lands in tracts of 640 acres, and were made out, written up, signed, and dated by the surveyor making the same prior to January 22, 1883, the date of the said repealing act; that the said field-notes were duly recorded by the surveyor in his office, and that a map thereof was made; that the same were returned to and filed in the general land office of Texas within the time prescribed by the said act of July 14, 1879, and that said plaintiffs in error tendered the amount of the purchase price of said lands to the treasurer of the State under and within the time required by the said act of July 14, 1879; the court of civil appeals erred in not deciding, upon such facts, that the plaintiffs in error did comply with all the conditions and requirements of the said acts of July 14, 1879, and March 11, 1881, for the purchase and appropriation of the said lands offered for sale under said acts, and thereby made a valid contract with the State of Texas for the purchase of said lands, and acquired a vested right and interest in the same within the protection of the Constitution of the United States, which could not lawfully be impaired or affected by any subsequent law of the State, and that the said act of the legislature of Texas approved January 22, 1883, suspending the sale of the unappropriated public lands of the State, could not and did not impair the said contract of plaintiffs in error
257 with the said State or take away their vested right in said lands or their right to complete their purchase under their said application and surveys.

VII.

The court of civil appeals erred in not holding that the field-notes of the surveys of Bacon and Graves having been made, written out, signed, and certified to in the language of the public statute of the State of Texas by the public officer making such field-notes prior to the 22nd day of January, 1883, the same imported verity, and that the due record of the field-notes of the said surveys so made and recorded in the proper surveyor's office and their due return to the general land office of Texas and the tender of the purchase price of the land and subsequent receipt thereof by the State of Texas created and constituted a contract for the purchase of said lands between the State of Texas and the purchasers thereof, which was protected from abrogation or impairment by section 10, article 1, of the Constitution of the United States, and section 1 of the fourteenth amendment of the said Constitution.

VIII.

The court of civil appeals erred in not holding upon all the facts found that the law embraced in article 3908, Revised Statutes of

the State of Texas, as far as applicable to the issues in this case, was not a continuation of the old law, as it was aforetime in Texas up to the adoption of said article 3908, and that the adoption of said article was not the enactment of a new law, but merely a continuance of the old law, as it aforetime was.

258 IX.

The court of civil appeals erred in failing to hold, upon all the facts found, that it was within the lawful and competent authority of the district and county surveyors of land in Texas, under all the laws of the State when the said surveys were made, for the said Bacon and Graves, prior to the 22nd day of January, 1883, to adopt the field-notes made by the former surveyors of the district, which they knew to be correct by verifying the same on the ground, and by such adoption to constitute such adopted field-notes good and valid field-notes and good and valid surveys.

X.

The court of civil appeals erred on all the facts found and applicable to the issue in not holding that the right of one official surveyor to adopt the field-notes made by a preceding official surveyor, which he believed to be correct, had, by reason of the numerous and uniform decisions of the courts of last resort in Texas through a long period of time, affirming such right, and of the practice in regard to surveying the public lands thereunder, become so firmly established as to constitute a rule of property in Texas, and in not deciding, therefore, that if the field-notes made for plaintiffs in error were not in fact made in the field, but were the result of the adoption of prior surveys and field-notes made by the predecessor of the surveyor who certified and returned them and who so certified and returned them with knowledge of the correctness of such prior surveys and field-notes obtained by going over the surveys on the
259 ground previously, such adoption, under this rule of property in Texas, constituted such field-notes of plaintiffs in error valid and sufficient field-notes and a legal and valid appropriation of the lands in controversy, creating a valid and binding contract of the State and a vested right in said Bacon and Graves by the survey of the said lands as so made for them by the authorized official surveyor.

XI.

The court of civil appeals erred in adjudging that the surveys of the said Bacon and Graves upon their application to purchase the lands in controversy under the said act of July 14, 1879, were not good and valid surveys which entitled them, upon the payment of the purchase-money, to the said lands, thereby impairing the obligation of a contract between the State of Texas and the said parties and destroying the vested rights of said plaintiffs in error, in contravention of article I, section 10, and the 14th article of the amendments of the Constitution of the United States.

XII.

The court of civil appeals erred on all the facts found and applicable to the issue in not holding that the repeal or suspension of the pre-existing law of Texas in relation to the sale of public domain of Texas at fifty cents an acre, which law existed prior to the repeal or suspension on the 22nd day of January, 1883, did not militate against the rights of plaintiffs in error in all lands
260 that had been surveyed for them prior to the day of such repeal or suspension to correct the field-notes, if defective or irregular in fact, but not on their face; then that such field-notes, regular and valid on their face, could not after such repeal or suspension be assailed as invalid in fact by the State of Texas, unless it were shown that the beneficiaries of such field-notes had knowledge of their invalidity or fatal irregularity in time to have had them corrected and made to conform to law prior to such repeal or suspension of said law.

XIII.

The court of civil appeals erred in not holding in the presence of all the facts found in the record that before the State of Texas could maintain the action for the recovery from plaintiffs in error of the lands in controversy upon the ground that it had made no contract by reason of the surveys so made for Bacon and Graves it was necessary for the State to tender or return to plaintiffs in error the full sum of one hundred and forty-nine thousand one hundred and twenty ($149,120) dollars, which said sum the State of Texas received from the plaintiffs in error as the full contract and purchase price of said lands placed in her treasury and appropriated and used for the same purposes as other moneys received by the State from other purchasers of lands under the same law were and are used and appropriated.

XIV.

It appearing that the lands were surveyed for the said
261 Bacon and Graves by the proper surveyors of the proper land district who adopted and copied the field-notes of previous surveys from the records of the office of the district surveyor prior to the repeal of the said act of July 14, 1879, by the said act of January 22, 1883, which field-notes were written out and officially certified to in all respects as the law provides; that before writing out these field-notes the surveyors had been upon the same ground in making other surveys of the same lands, the field-notes of which were so adopted, and had seen enough of the adopted work by verifying the same to satisfy them of its entire correctness; that said field-notes were returned to the general land office with the plat or map of the lands; that the purchase price, to wit, one hundred and forty-nine thousand one hundred and twenty dollars, was received by the State in payment for the same; that the proper receipts were prepared and signed acknowledging the payment of the purchase price of the land and were duly delivered to said plaintiffs in error, which sum of money is held and used by the State. The court of

civil appeals erred in not adjudging, in view and by reason of such facts, that the State of Texas is precluded from denying that it made a contract with plaintiffs in error to sell the lands in controversy, and the State is estopped from denying that the said lands were so surveyed as to create a contract which binds it and which could not be impaired by repealing the said act of July 14, 1879, while and so long as it retains the money it so received for the said lands.

262 XV.

The court of civil appeals erred in affirming the judgment of the district court and in not reversing the said judgment, whereby the State of Texas had and recovered the said lands from the plaintiffs in error.

J. HUBLEY ASHTON,
T. D. COBBS,
WALTON, HILL & WALTON,
Attorneys and Counsellors for Petitioners.

(Endorsed:) Filed in court of civil appeals November 11, 1893. W. L. Huff, clerk second supreme judicial district.

263 *Writ of Error Bond.*

Know all men by these presents that we, E. M. Bacon, E. G. Graves, and C. C. Gibbs, trustee, as principal-, and E. W. Cave and Wm. D. Cleveland, as sureties, are held and firmly bound unto the State of Texas in the full and just sum of two thousand dollars, to be paid to the said State of Texas' certain attorney-, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a term of the court of civil appeals for the second supreme judicial district of Texas, December 6th, 1892, in a suit depending in said court between E. M. Bacon, E. G. Graves, and C. C. Gibbs, trustee, as appellants, and The State of Texas as appellee, a judgment was rendered against the said E. M. Bacon, E. G. Graves, and C. C. Gibbs, trustee, appellants, and the said E. M. Bacon, E. G. Graves, and C. C. Gibbs, trustee, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Texas, to be served on C. A. Culberson, attorney general of the State of Texas and attorney of record in said cause, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within — days from the date thereof:

Now, the condition of the above obligation is such that if the said E. M. Bacon, E. G. Graves, and C. C. Gibbs, trustee, shall prose-

cute their writ of error to effect and answer all damages and
264 costs if they fail to make — plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

E. M. BACON. [SEAL.]
E. G. GRAVES. [SEAL.]
C. C. GIBBS, *Trustee.* [SEAL.]
E. W. CAVE. [SEAL.]
WM. D. CLEVELAND. [SEAL.]

Approved by—

STEPHEN J. FIELD,
Associate Justice Sup. Court U. S.

(Endorsed:) E. M. Bacon and E. G. Graves and C. C. Gibbs *vs.* The State of Texas. Bond for writ of error. Filed in court of civil appeals Oct. 31, 1893. W. L. Huff, clerk 2nd supreme judicial district.

265 *Clerk's Certificate.*

THE STATE OF TEXAS, }
Tarrant County. }

I, W. L. Huff, clerk of the court of civil appeals, second supreme judicial district, at Ft. Worth, Texas, do hereby certify and return, in obedience to the writ of error herein granted, that the above and foregoing is a true and complete transcript of the record of all the proceedings had in said court and of all papers filed wherein E. M. Bacon, E. G. Graves, and C. C. Gibbs, trustee, were appellants, and The State of Texas was appellee, as the same appear from the records and files of said court now remaining in my custody and control.

I further certify that the original writ of error and citation, with proof of service and acknowledgment of service, have been returned with this record to the clerk of Supreme Court of the United States.

I further certify that a copy of the writ of error has been retained in my office for defendant in error.

Seal Court of Civil Appeals of the State of Texas.

To certify all which, witness my official signature and seal of said court, at office in the city of Ft. Worth, Texas, this 11th day of November, A. D. 1893.

W. L. HUFF,
Clerk of Court of Civil Appeals, Second Supreme Judicial District of Texas, at Ft. Worth.

266 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the court of civil appeals for the second supreme judicial district of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between E. M. Bacon, E. G. Graves, and C. C. Gibbs, trustee, appellants, and the State of Texas, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause
267 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of October, in the year of our Lord one thousand eight hundred and ninety-three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

Without a supersedeas.

268 (Endorsed:) E. M. Bacon, E. G. Graves, & C. C. Gibbs, *vs.* The State of Texas. Writ of error. Filed in court of civil appeals Oct. 31, 1893. W. L. Huff, clerk, 2nd supreme judicial district.

269 UNITED STATES OF AMERICA, *ss:*

To the State of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of civil appeals for the second supreme judicial district of the State of Texas, wherein E. M. Bacon, E. G. Graves, and C. C. Gibbs, trustee, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States this 20th day of October, in the year of our Lord one thousand eight hundred and ninety-three.

STEPHEN J. FIELD,
Associate Justice Supreme Court of the United States.

270 On this 1st day of November, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared I. V. Davis before me, the subscriber, a credible citizen having no interest in this suit, and makes oath that he on this day delivered a true copy of the within citation to Frank Andrews, who is in charge of the attorney general's office and first office assistant of the attorney general, as Hon. C. A. Culberson, attorney general, is absent from the State and it is not known when he will return to the State, and by further delivering a copy of this citation, on the same day, to Hon. J. S. Hogg, governor of the State of Texas.

I. V. DAVIS.

Sworn to and subscribed the 1st day of November, A. D. 1893.

[NOTARIAL SEAL.] J. H. HENDERSON,
Notary Public in & for Travis County, Texas.

Service of the within writ accepted this Nov. 4th, 1893.

C. A. CULBERSON,
Att'y Gen. of Texas.

On this the second day of November, in the year of our Lord one thousand eight hundred & ninty-three, personally appeared G. W. Eason before me, a dep'ty United States marshal of the eastern district of Texas, who, having no interest in this suit, *and* makes oath that he on this day delivered a true copy of the within citation to R. L. Henry, the assistant attorney general of the State of Texas, one of the attorneys of record to the within-stated suit, and who, *is*

by virtue of his office in the absence of the attorney general (who is now out of the State), performs the duties of that office during his absence.

G. W. EASON,
Dep'ty U. S. M., E. D. of Texas.

Sworn to and subscribed before me this the 2d day of November, A. D. 1893.

[The Seal of the U. S. District Court, Eastern Dist. Texas.]

D. W. PARISH,
Clerk of the United States District Court for the Eastern District of Texas, at Tyler, Texas.

Filed in court of civil appeals Nov. 5, 1893.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Endorsed on cover: Case No. 15,448. Texas court of civil appeals. Term No., 603. E. M. Bacon, E. G. Graves, and C. C. Gibbs, trustee, plaintiffs in error, *vs.* The State of Texas. Filed November 18, 1893.

603

Office Supreme Court, U. S.
FILED.
DEC 17 1894
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States,

October Term, 1894.

E. M. BACON, E. G. GRAVES, AND C. C. GIBBS, TRUSTEE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

MOTION TO DISMISS WRIT OF ERROR.

C. A. CULBERSON,
Attorney General of Texas.

IN THE

Supreme Court of the United States,

October Term, 1894.

E. M. BACON, E. G. GRAVES, AND C. C. GIBBS, TRUSTEE, PLAINTIFFS IN ERROR,

VS.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

The State of Texas, by the Attorney General thereof, moves the court to dismiss the writ of error herein for the following reasons:

1. It is sought to review a judgment of the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas, which is not the highest court of said State in which a decision on the matter in controversy could be had.

2. No question arising under the Constitution or laws of the United States is presented by the record.

C. A. CULBERSON,
Attorney General of Texas.

T. D. Cobbs, Esq., Counsel for Plaintiff in Error:

Take notice that the above motion will be submitted to the Supreme Court of the United States on Monday, January 1st, 1895, or as soon thereafter as the court will entertain it.

C. A. CULBERSON,
Attorney General of Texas.

Service of the foregoing motion is accepted.

T. D. COBBS,
Counsel for Plaintiff in Error.

December 10th, 1894.

BRIEF ON MOTION TO DISMISS WRIT OF ERROR.

STATEMENT OF THE CASE.

J. E. Elgin claims to have surveyed a large body of land in July, 1873, for the Houston & Texas Central Railway Company in Scurry, Borden and adjoining counties, in the State of Texas, under donations by that State, platting part of the land as blocks 27 and 97, in which is included the land involved in this suit. In reference to the manner in which Elgin surveyed blocks 97 and 27, the court found that "blocks 97 and 27 were actually surveyed on the ground by Elgin in the manner in which it has been customary by surveyors in Texas to survey large bodies of land, that is, by running the outside boundary lines of the blocks, or a part of them, putting up permanent landmarks, and leaving the interior lines without running. These blocks, in writing up field notes, were divided into 640 acre surveys, and the interior surveys were made without actually running the lines, and Elgin did not run all the lines of any section in blocks 27 and 97, unless, as he says, it was done by accident." (Record, p. 12.)

This land is situated within the Texas & Pacific Railway Company Reservation, and the survey and attempted appropriation were therefore void. (Record, p. 21.)

Jumbo Company v. Graves, 79 Texas, 5.

When the survey was made, Elgin was a deputy surveyor of Jack county (Record, p. 41), while the land was in the Young Land District (Record, p. 66), and consequently the survey was void for that reason.

Cox v. R. R. Co., 68 Texas, 226.

The legislature of the State of Texas by an act approved July 14th, 1879, and amended by an act approved March 11th, 1881, in a particular not pertinent here, offered the lands in the Texas and Pacific Reservation, with others, for sale at fifty cents an acre on certain conditions; and, among other things, the act

T. D. Cobbs, Esq., Counsel for Plaintiff in Error:

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This land is situated within the Texas & Pacific Railway Company Reservation, and the survey and attempted appropriation were therefore void. (Record, p. 21.)

Jumbo Company v. Graves, 79 Texas, 5.

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provides that "any person, firm or corporation, desiring to purchase any of the unappropriated land herein set apart and reserved for sale, may do so by causing the tract or tracts which said person, firm or corporation, desire to purchase, to be surveyed by the authorized public surveyor of the county or district in which said land is situated."

General Laws of Texas 1879, p. 48.

On December 1st, 1882, E. M. Bacon and E. G. Graves, two of the plaintiffs in error, made application to purchase about 550 sections of this land containing 640 acres each, to the surveyor of the Palo Pinto Land District, in which the land was then situated, under the terms of the act of 1879. Of the land sought to be purchased 33,280 acres are in block 27, and 341,860 acres are in block 97. (Record, p. 21.)

The legislature of Texas convened in regular session in January, 1883, and on the 11th day of that month bills were introduced, both in the Senate and House of Representatives (Record, p. 26), to repeal the act of July 14th, 1879, and an act to that effect was approved January 22nd, 1883.

General Laws of Texas 1883, p. 2.

Both Bacon and Graves resided at Austin, and Graves had been employed in the Land Office as assistant draftsman (Record, p. 126) at least until November 29th, 1882. Neither of them denied on the trial a knowledge of the proceedings in the legislature. In the meantime nothing was done toward surveying the land under their application until January 17th, 1883, and between that date and January 24th, only eight days, two deputy surveyors claim to have surveyed this large body of land into sections of 640 acres each, as prescribed by the act of 1879. They purport to have surveyed it, some of it on Sunday, January 21st, into four blocks aggregating 586 surveys of 640 acres each, namely, block B, 117 surveys; G, 291; M, 126, and N, 52, and falsely certified that the survey had been actually made in the field. (Record, p. 10, *et seq.*)

The court found as a fact (Record, p. 12, para. 15), which is not controverted by plaintiffs in error, that "none of the land in suit was actually surveyed upon the ground by the deputy surveyors

who purported to have done so, but they merely copied in the office of the surveyor of the Palo Pinto land district the field notes of the Elgin survey." Graves was present when the field notes were copied (Record, p. 38), and knew that no survey was being made. The court also found as a fact (Record, p. 13, paragraph 16) that the deputy surveyors "had, prior to the adoption of the field notes for Bacon and Graves, run lines and ascertained corners in blocks 27 and 97, and found them to be as correct as any work of that character in that part of the State, and were satisfied as to the substantial accuracy of said surveys." But plaintiffs in error do not now claim title to any land in block 27 under their application, and while there are 611,000 acres in block 97 (Record, top p. 13), they claim and have attempted to pay for only 298,240 acres in that block (Record, pp. 5, 7). Although, as thus found by the court, these surveyors may have run lines and ascertained corners in block 97, it is not shown that these lines and corners are those of sections involved in this suit, the field notes of which were copied. On the contrary, the deputy surveyor, Berry, was silent on the subject, and Williams testified (Record, p. 39), "I do not know any section of the H. & T. C. Railway Company survey, *included in this suit*, on which I run any line." The field notes were recorded in the surveyor's office and returned to the land office within the time prescribed by law. On May 16, 1883, Bacon and Graves tendered to the State Treasurer $80,640, and on May 19, 1883, they tendered the further sum of $104,640, the aggregate, $185,280, being tendered in payment for surveys Nos. 118 to 291, inclusive, in block G, Nos. 1 to 119 in block M, Nos. 1 to 52 in block N, Nos. 1 to 117 in block B, and Nos. 1 to 135 in block G. (Record, p. 13, paragraph 24). The tender was declined by the State Treasurer, because some of the surveys covered school lands (Record, pp. 59, 60), but at that time the Treasurer did not know the lands had not been surveyed (Record, p. 42). By deed dated May 26th, 1890, Bacon and Graves transferred the land to C. C. Gibbs, as trustee (Record, p. 12, par. 14). On January 3d, 1891, plaintiffs in error paid into the State treasury $149,120 on their application to purchase, or $36,160 less than their tender, which payment was made on sections 1 to 291, inclusive, in block G, 1 to

58, inclusive, in block M, and 1 to 117 in block B (Record, p. 59). Every section of land for which it is claimed payment has been made or for which judgment is demanded (Record, p. 7) purports to have been surveyed on January 22d, the day the act of July 14th, 1879, was repealed, or prior thereto (Record, p. 11, paragraphs 4 to 11, inclusive). The finding of fact by the Court of Civil Appeals (Record, p. 138) that "the Treasurer of the State had several times refused to accept this money, and at the time he received it, in January, 1891, the parties paying fully understood that the State would contest their claim to this land and the Treasurer did not receive the money as a legal payment therefor," is fully supported by the record. The Treasurer testified that it was received and accepted on the advice of the then Attorney General (Record, pp. 42, 62), and that official testified (Record, p. 42): "About the date named, State Treasurer Lubbock notified me, as Attorney General, that the representatives of Bacon and Graves wanted to make a payment in part or in full for the lands claimed of the State by the said Bacon and Graves. I went into the Treasurer's office, and there met the Treasurer, the chief clerk, Mr. Wortham, Mr. Frank Hamilton, and, I believe, Mr. John Maddox. The latter two proposed 'to tender' to the State a sum of money amounting to over a hundred thousand dollars, claimed to be due for lands located by Bacon and Graves. The Treasurer asked me what he should do. After notifying him and all parties present that the State ignored Bacon and Graves' claim, and would contest it in the courts, I told the Treasurer to accept the money, as the tender, with his refusal to accept it, was equivalent in law, so far as the rights of the parties were concerned, to the actual payment of the money. In this conversation I notified Hamilton and Maddox, as well as the Treasurer, that the State would waive no rights, but that it disputed the validity and justness of Bacon and Graves' claim, and would contest it and all rights thereunder. I repeat the effect and substantially the language of that conversation. Immediately after this, my recollection is, the money was tentered by the said parties, and accepted by the State Treasurer." This suit was instituted by the Attorney General in September, 1891, in the District Court of Scurry county, against the Houston

and Texas Central Railway Company, E. M. Bacon, E. G. Graves, and C. C. Gibbs, trustee, to recover the entire body of land applied for and claimed to have been surveyed, aggregating about 550 sections, and on the application of defendants the venue was changed to Mitchell county. The action was afterwards dismissed as to the railway company, and was in the usual form of trespass to try title. On December 14th, 1891, defendants filed their amended answer, upon which the cause was tried, which consists of a general demurrer, special exceptions and special answer, the latter setting forth a specific claim to 298,240 acres of the land under the alleged purchase and survey, tender of the purchase money in 1883, and payment in 1891, as heretofore detailed. After reciting the supposed purchase by application, survey, tender and payment, the answer thus states what is presumed to be the Federal question relied upon therein, for it is the only hint of such in that pleading: "The said plaintiff to be permitted to deprive these defendants of the lands so purchased by them as aforesaid and in which they have a vested right, will be in violation of the Constitution of the United States, impair and destroy the obligation of the contract, and perpetrate an irreparable wrong and injury upon defendants. That the defendants having in all respects fully complied with the provisions of the law in respect to the purchase of said lands, under which said lands were offered for sale by the plaintiff, their rights thereto became and were vested, and the act of the legislature subsequent thereto repealing said law was, under Art. 2, Sect. 10, subdivision 1, of the Constitution of the United States, null and void as affecting defendants' vested rights." (Record, p. 7.)

The State replied to this answer by supplemental petition as follows:

"And specially replying thereto, the plaintiff says the defendants were not entitled or authorized to purchase the said lands, and did not comply with the law in reference thereto in any particular, and did not, in fact, purchase the same from plaintiff through any officer authorized to bind or conclude the plaintiff, and said lands were not at the times named by defendants on the market for sale.

The plaintiff says that if said defendants did in fact tender the treasurer the sum of money named, in 1883 as alleged, the treasurer properly refused and declined to receive the same, for that the defendants had not purchased the same from plaintiff, by complying fully with any existing law authorizing the purchase and sale thereof; and if said defendant did in fact pay to the treasurer, in 1891, the sum named in said answer, the said treasurer was not authorized by law to receive it, and this the defendants well knew, and said payment, if made, was so made after a full and explicit notice to the defendants that plaintiff repudiated and would vigorously contest the claim of defendants to said lands, and said defendants paid the same at their peril.

The plaintiff further shows that none of the requirements of said laws relating to the purchase of said lands were complied with by the defendants, E. M. Bacon and E. G. Graves, and any and all acts and certificates by the surveyor of Palo Pinto county and his deputies, alleging and purporting a compliance therewith, are wholly false and untrue, and were known to be such by said defendants when they were done, made and given, and were so done, made and given pursuant to a combination between said defendants and said officers for the purpose of defeating and evading the laws and wrongfully and illegally acquiring a claim to said lands."

The cause was tried by the court without a jury and on December 22, 1891, judgment was rendered for the State for the land sued for. The findings of fact by the trial court, so far as applicable to this motion, have already been given in this statement and the conclusions of law therein are as follows:

"From the foregoing facts I conclude that the plaintiff, the State of Texas, is entitled to recover in this suit on each of the ollowing grounds, to wit:

"1. Bacon and Graves were not responsible parties at the time they applied to purchase this land and could not purchase under the law.

"2. They did not comply with the law by having the land surveyed, as was required by law, and therefore could not purchase it.

"3. The survey as adopted was not made in accordance with

law—is incorrect, totally so—in having a greater frontage on permanent water than is permitted under the acts of 1879 and 1881.

"4. Bacon and Graves have never paid or offered to pay for said land until long after the expiration of the time allowed and required by law. The purported surveys of many of the sections of land for which they tendered payment on May 19, 1883, were made after the 50-cent act was repealed, and Bacon and Graves did not separate or offer to separate in their tender the surveys made before the repeal from those made after, and there was consequently no legal tender.

"5. At the time Graves entered into an agreement with Bacon to purchase these lands he was an employé in the general land office, and his action was against the civil and criminal laws of the State.

"6. I further hold that the State is not bound to return the money paid in January, 1891, to entitle it to a judgment for the land."

No motion for a new trial was made and an appeal was duly and regularly perfected to the Supreme Court of the State. Afterwards, under an amendment to the Constitution, creating the Courts of Civil Appeals, and an act of the Legislature defining their jurisdiction and powers, the case was properly transferred to the Court of Civil Appeals for the Second Supreme Judicial District. Of the assignments of error in the Court of Civil Appeals only three, namely, the 10th, 12th and 19th, can have any possible bearing upon this motion, and they are as follows:

"10. The court erred in its second conclusion of law, in holding that Bacon and Graves failed to comply with the law in not having the survey made as required by law, and therefore could not purchase under the law, because it is not shown in what particular they failed to comply with the law to entitle them to purchase the land, but, on the contrary, said Bacon and Graves did, in every respect and particular, comply with the law in making the proper application and requests of the surveyor to survey the lands, and if not done in all respects and particulars, defendants can not be made to suffer by the acts of the public officer."

"12. The court erred in its fourth conclusion of law, in holding that Bacon and Graves never paid or offered to pay for said land until long after the expiration of the time allowed and required by law; for that defendants acquired a vested right by the survey of the lands made prior to the repeal of the law of the 14th of July, 1879, and amendments in 1881, and their right to the land could not be impaired by the law being repealed, nor right to pay therefor, nor by any adverse legislation in respect thereto impairing their rights."

"19. The court erred in rendering judgment against defendants in this cause under the law and the evidence for the land claimed by them in their answer, and the judgment should have been for defendants; for that the evidence showed that the land had in all respects been legally surveyed for defendants in accordance with law and the rule laid down and established by the decisions of the Supreme Court of the State of Texas for surveying lands, which had become a rule of property; and because the defendants paid the purchase price for the land, as fixed by the laws of the State of Texas, as soon as the same would be received by the State, and the State having received the money and put it to the same use as all other moneys of the State received for the purchase of lands, under the same law, the State therefore, is estopped from denying defendants' right to the land, and ought not to be heard or permitted to recover the land without a return, or offer to return, of the money paid, to-wit: $149,320, and the lawful interest thereon from date of payment."

The cause was heard by the Court of Civil Appeals December 6, 1892, and the judgment of the District Court affirmed. Upon the questions of fact this court adopted the findings of the District Court, except this court held that Bacon and Graves were responsible parties within the meaning of the act of 1879, and explained that the receipt of the money in 1891 by the treasurer was with the full knowledge on the part of the persons paying, that the State would contest the claim and that the acceptance of the money by him was not as a legal payment for the land. (Record, p. 138.)

The opinion of the Court of Civil Appeals on the law of the case may be thus summarized: (1) That while the Supreme

Court of Texas has held that surveyors may adopt field notes of previous surveys of the same land, yet since those decisions, and to guard against the practice of loose surveys, the legislature by the Revised Statutes of 1879, provided more stringent laws regulating surveys, and under this new law the adoption of field notes does not constitute a survey; (2) that the description of the land in the petition, following the application to purchase, is sufficient, and that trespass to try title is a proper form of action to recover the land; (3) that the State is not required to return the money received by the treasurer before the action can be maintained, the presumption being that the State will do justice by repaying the money, should the suit for the land be successful; (4) that while Graves was an employé of the Land Office and his action in dealing in public lands was contrary to public law, no opinion is expressed, in view of the decision upon the first point, as to its effect upon the case; (5) that the holding of the District Court that Bacon and Graves were not responsible parties is not concurred in, nor the other ruling that because some of the surveys have a greater frontage on permanent water than is permitted by law, all the surveys are invalidated, and (6) the 4th conclusion of law of the trial court is expressly overruled and it is held that the tender of the purchase money was made in time. (Record, pp. 139 to 144.)

Two motions for a rehearing were made, one by Bacon and Graves jointly, and one by C. C. Gibbs as trustee. In the former the only ground which pretends to state a Federal question is the 7th, as follows: (Record, p. 151.)

"VII.

"The court erred in not holding that by reason of the surveys as made, appellants had an executory contract with the State, which entitled them, upon payment of the purchase money, to the lands in controversy.

For the opinion of this court in this cause ignores a rule of property, and is destructive of the vested rights of appellants, contrary to Art. 2, Sec. 10, and the 14th article of amendments of the Constitution of the United States, and contrary to the Constitution of this State.

"The rule of property ignored by this court is, that an actual survey in the field by an official surveyor may be subsequently adopted by the surveyor who made it, or by any other official surveyor who believes the survey to be a correct survey; and a survey so made becomes the official act of the surveyor who made it by adoption, and is in contemplation of law a valid survey, and a legal appropriation of the public land.

"The custom of adopting surveys has been so long and so universally observed by the duly authorized surveyors of the State, acted upon by the public, and recognized by the decisions of our Supreme Court, that it has become a rule of property, under which vast property rights have been acquired. Relying upon this rule of property, the State's officers acted in making the surveys in controversy, and upon it depend not only the vested rights of appellants in this cause, but the validity and legality of the survey of millions of acres of land for other citizens are also based upon this rule of property. And should the opinion in this cause be adhered to, our legislature might deem it necessary to cure by a resurvey or by a validating act, the illegality in the survey of three million acres for the common school fund and the University; and the illegality of Strong's survey of the whole of Greer county.

"In view of the grave consequences that would result from the opinion in this cause if adhered to, it may well be said that 'nothing short of a statute clearly requiring such a construction would justify it.' And we submit, in the language of Chief Justice Stayton, in Thomson v. The Railway, that a legal survey 'is a description of land for its identification rather than the actual work done by the surveyor, to enable him to give such a description.'"

The motion filed by Gibbs is quite lengthy, and much of it is purely repetition. A careful reading of it shows that in so far as there is an attempt to state a question arising under the Constitution or laws of the United States, it but reiterates the substance of the preceding motion, and its general character on this point is well illustrated by the 14th ground, which is as follows (Record, p. 160):

"XIV.

"The evidence in the record of surveyors and land commissioners, showing the custom of surveyors to adopt the field notes of official surveys previously made, for the period of many years, concurred in by the departments in charge of the surveys of lands in Texas, and the decisions of the Supreme Court recognizing the custom and right to acquire land in this way, that is, by adopting field notes made by previous official surveyors, became a property right of appellants; and the deprivation of their property, through a new rule, and through a new construction of the laws of this State in respect thereto, is the taking of their property without due process of law, constitutes an impairment of the obligations of the contract entered into between the State of Texas and appellants, Bacon and Graves, and therefore is in violation of the 10th section of the second article of the Constitution of the United States, which provides: 'No State shall pass any law impairing the obligation of contracts;' and in violation of the 14th article of amendments to said Constitution, which provides that 'no State shall deprive any person of life, liberty or property without due process of law.' And this decision, if addered to, is violative of the said provisions of the Constitution of the United States, and consequently destroys the vested right of appellants, and is therefore null and void."

These motions for a rehearing were overruled January 11th, 1893, and an application to the Supreme Court of Texas for a writ of error to the Court of Civil Appeals was refused. (Record, p. 162.)

A writ of error to review the judgment of the Court of Civil Appeals was allowed without a supersedeas by Mr. Justice Field of the Supreme Court of the United States, October 20th, 1893, and the following assignment of errors was filed, viz.:

"I.

"The Court of Civil Appeals erred in deciding that the act of the legislature of the State of Texas, entitled 'An act to withdraw the public lands of the State of Texas from sale,' approved January 22, 1883, is not repugnant to the Constitution of the United States in that the said act did not impair the obligation

of a contract between the State of Texas and the plaintiffs in error in respect to the lands in controversy in this suit, and the purchase thereof under the act of the legislature of the State of Texas, entitled 'An act to provide for the sale of the unappropriated domain of the State of Texas, and the investment of the proceeds of such sale,' approved July 14, 1879, and amendments thereto, approved March 11, 1881, and in not holding that the said act of the legislature of Texas, approved January 22, 1883, is repugnant to the Constitution of the United States in that the said act impaired the obligation of a valid contract for the purchase of the said lands between the State of Texas and the said appellants, arising under and created by the said acts of the legislature of Texas, approved July 14, 1879, and March 11, 1881.

"II.

"The Court of Civil Appeals erred in deciding that the said plaintiffs in error, E. M. Bacon and E. G. Graves, had not a valid contract with the State of Texas to purchase the said lands under the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881, the obligation of which was impaired by the said State by the said acts of the legislature thereof approved January 22, 1883.

"III.

"The Court of Civil Appeals erred in deciding that the said plaintiffs in error had no vested interest in the said lands under and by virtue of the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881, which was impaired or affected by the said act of the State of Texas approved January 22, 1883, and in not adjudging that the said plaintiffs in error, under the said acts approved July 14, 1879, and March 11, 1881, had acquired a vested right and interest in the said lands by contract with the State of Texas, within the protection of the Constitution of the United States, which was impaired by the said act of the State of Texas approved January 22, 1883, in contravention of the said Constitution.

"IV.

"The Court of Civil Appeals erred in not deciding that the

plaintiffs in error, E. M. Bacon and E. G. Graves, by their application to purchase the lands in controversy under the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881, and the surveys of the same as made for them by the official surveyors before the passage by the said legislature of the said act approved January 22, 1883, and recorded in the office of the district surveyor and returned to the General Land Office of Texas, acquired a vested right in the said lands, and a valid contract with the State of Texas for the purchase of the same under the said act of July 14, 1879, which the legislature of the State could not lawfully take away and impair by the repeal of the said act in and by the said act approved January 22, 1883.

"V.

"The Court of Civil Appeals erred in not deciding that the plaintiffs in error had the right to pay the amount of the purchase price for the said lands after and notwithstanding the passage of the said act of the legislature of Texas approved January 22, 1883, which could not be defeated or affected by the refusal of the Treasurer of the State of Texas to receive the same as tendered within the time prescribed by the said act of July 14, 1879, and in not deciding that after such tender and payment of the said purchase money, as made by them, the State of Texas could not have and recover from the plaintiffs in error the lands in controversy in this suit.

"VI.

"It appearing by the record that the field notes of said surveys, as made for the said plaintiffs in error upon their application to purchase the said lands under the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881, described the lands in tracts of 640 acres, and were made out, written up, signed, and dated by the surveyor making the same prior to January 22, 1883, the date of the said repealing act; that the said field notes were duly recorded by the surveyor in his office, and that a map thereof was made; that the same were returned to and filed in the General Land Office of Texas, within the time prescribed by the said act of July 14, 1879, and that said plaintiffs in error tendered the amount of the purchase price of said

lands to the treasurer of the State under and within the time required by the said act of July 14, 1879; the Court of Civil Appeals erred in not deciding upon such facts, that the plaintiffs in error did comply with all the conditions and requirements of the said acts of July 14, 1879, and March 11, 1881, for the purchase and appropriation of the said lands offered for sale under said acts, and thereby made a valid contract with the State of Texas for the purchase of said lands, and acquired a vested right and interest in the same within the protection of the Constitution of the United States, which could not lawfully be impaired or affected by any subsequent law of the State, and that the said act of the legislature of Texas approved January 22, 1883, suspending the sale of the unappropriated public lands of the State, could not and did not impair the said contract of plaintiffs in error with the said State or take away their vested right in said lands or their right to complete their purchase under their said application and surveys.

"VII.

"The Court of Civil Appeals erred in not holding that the field notes of the surveys of Bacon and Graves having been made, written out, signed, and certified to in the language of the public statute of the State of Texas by the public officer making such field notes prior to the 22d day of January, 1883, the same imported verity, and that the due record of the field notes of the said surveys so made and recorded in the proper surveyor's office and their due return to the General Land Office of Texas, and the tender of the purchase price of the land and subsequent receipt thereof by the State of Texas, created and constituted a contract for the purchase of said lands between the State of Texas and the purchasers thereof, which was protected from abrogation or impairment by section 10, article 1, of the Constitution of the United States, and section 1 of the fourteenth amendment of the said Constitution.

"VIII.

"The Court of Civil Appeals erred in not holding upon all the facts found that the law embraced in article 3908, Revised Statutes of the State of Texas, as far as applicable to the issues in

this case, was not a continuation of the old law, as it was aforetime in Texas up to the adoption of said article 3908, and that the adoption of said article was not the enactment of a new law, but merely a continuance of the old law, as it aforetime was.

"IX.

"The Court of Civil Appeals erred in failing to hold, upon all the facts found, that it was within the lawful and competent authority of the district and county surveyors of land in Texas, under all the laws of this State, when the said surveys were made, for the said Bacon and Graves, prior to the 22d day of January, 1883, to adopt the field notes made by the former surveyors of the district, which they knew to be correct by verifying the same on the ground, and by such adoption to constitute such adopted field notes good and valid field notes and good and valid surveys.

"X.

"The Court of Civil Appeals erred on all the facts found and applicable to the issue in not holding that the right of one official surveyor to adopt the field notes made by a preceding official surveyor, which he believed to be correct, had, by reason of the numerous and uniform decisions of the courts of last resort in Texas through a long period of time, affirming such right, and of the practice in regard to surveying the public lands thereunder, become so firmly established as to constitute a rule of property in Texas, and in not deciding, therefore, that if the field notes made for plaintiffs in error were not in fact made in the field, but were the result of the adoption of prior surveys and field notes made by the predecessor of the surveyor, who certified and returned them, and who so certified and returned them with the knowledge of the correctness of such prior surveys and field notes obtained by going over the surveys on the ground previously, such adoption, under this rule of property in Texas, constituted such field notes of plaintiffs in error valid and sufficient field notes and a legal and valid appropriation of the lands in controversy, creating a valid and binding contract of the State, and a vested right in said Bacon and Graves by the survey of the

said lands as so made for them by the authorized official surveyor.

"XI.

"The Court of Civil Appeals erred in adjudging that the surveys of the said Bacon and Graves upon their application to purchase the lands in controversy under the said act of July 14, 1879, were not good and valid surveys which entitled them, upon the payment of the purchase money, to the said lands, thereby impairing the obligation of a contract between the State of Texas and the said parties, and destroying the vested rights of said plaintiffs in error, in contravention of article 1, section 10, and the 14th article of the amendments of the Constitution of the United States.

"XII.

"The Court of Civil Appeals erred on all the facts found and applicable to the issue in not holding that the repeal or suspension of the pre-existing law of Texas in relation to the sale of public domain of Texas at fifty cents an acre, which law existed prior to the repeal or suspension on the 22d day of January, 1883, did not militate against the rights of plaintiffs in error in all lands that had been surveyed for them prior to the day of such repeal or suspension to correct the field notes, if defective or irregular in fact, but not on their face; then that such field notes, regular and valid on their face, could not after such repeal or suspension be assailed as invalid in fact, by the State of Texas, unless it were shown that the beneficiaries of such field notes had knowledge of their invalidity or fatal irregularity in time to have had them corrected and made to conform to the law prior to such repeal or suspension of said law.

"XIII.

"The Court of Civil Appeals erred in not holding in the presence of all the facts found in the record that before the State of Texas could maintain the action for the recovery from plaintiffs in error of the lands in controversy upon the ground that it had made no contract by reason of the surveys so made for Bacon and Graves it was necessary for the State to tender or return to plaintiffs in error the full sum of one hundred and forty-nine

thousand one hundred and twenty ($149,120) dollars, which said sum the State of Texas received from the plaintiffs in error as the full contract and purchase price of said lands placed in her treasury and appropriated and used for the same purpose as other moneys received by the State from other purchasers of lands under the same law were and are used and appropriated.

"XIV.

"It appearing that the lands were surveyed for the said Bacon and Graves by the proper surveyors of the proper land district who adopted and copied the the field notes of previous surveys from the records of the office of the district surveyor prior to the repeal of the said act of July 14, 1879, by the said act of January 22, 1883, which field notes were written out and officially certified to in all respects as the law provides; that before writing out these field notes the surveyors had been upon the same ground in making other surveys of the same lands, the field notes of which were so adopted, and had seen enough of the adopted work by verifying the same to satisfy them of its entire correctness; that said field notes were returned to the general land office with the plat or map of the lands; that the purchase price, to-wit, one hundred and forty-nine thousand one hundred and twenty dollars, was received by the State in payment for the same; that the proper receipts were prepared and signed acknowledging the payment of the purchase price of the land, and were duly delivered to said plaintiffs in error, which sum of money is held and used by the State. The Court of Civil Appeals erred in not adjudging, in view and by reason of such facts, that the State of Texas is precluded from denying that it made a contract with plaintiffs in error to sell the lands in controversy, and the State is estopped from denying that the said lands were so surveyed as to create a contract which binds it, and which could not be impaired by repealing the said act of July 14, 1879, while and so long as it retains the money it so received for the said lands.

"XV.

"The Court of Civil Appeals erred in affrming the judgment of the District Court and in not reversing the said judgment,

whereby the State of Texas had and recovered the said lands from the plaintiffs in error."

The grounds urged for dismissal of the writ of error will be considered in the order presented:

FIRST.

"It is sought to review a judgment of the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas, which is not the highest court of said State in which a decision on the matter in controversy could be had."

By the amendment to the Constitution of Texas, adopted September 22, 1891, it is provided that "the Supreme Court shall have appellate jurisdiction only, except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law, the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law, or where a statute of the State is held void."

85 Texas, 622, section 3.

The jurisdiction of the Supreme Court was further defined by an act of the Legislature, approved April 13th, 1892, as follows:

"Article 1011. That the Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, which shall extend to questions of law arising in all civil cases of which the Courts of Civil Appeals have appellate but not final jurisdiction.

Article 1011a. All causes shall be carried up to the Supreme Court by writs of error issuing from the Supreme Court to the Courts of Civil Appeals upon final judgment and not on judgments reversing and remanding causes except in the following cases, to-wit:

(1) Where the State is a party or where the Railroad Commissioners are parties.

(2) Cases which involve the construction and application of the Constitution of the United States or of the State of Texas or of an act of Congress.

(3) Cases which involve the validity of a statute of the State.

(4) Cases involving the title to a State office.

(5) Cases in which a Civil Court of Appeals overrules its own decisions or the decision of another Court of Civil Appeals or of the Supreme Court.

(6) Cases in which the judges of any Court of Civil Appeals may disagree.

(7) Cases in which any two of the Courts of Civil Appeals may hold differently on the same question of law.

(8) When the judgment of the Court of Civil Appeals reversing a judgment practically settles the case, and this fact is shown in the petition for writ of error.

Article 1011b. Any party desiring to sue out a writ of error before the Supreme Court, shall present his petition to said Court stating the names and residences of the parties adversely interested, with a brief statement of the nature of his case and the ground upon which the writ of error is prayed, and it must appear that the errors complained of arose upon questions of law, the determination of which were necessary to the decision of the cause in the Court of Civil Appeals, and that said questions was [were] properly presented to said Court, and it must further appear that the Supreme Court would have jurisdiction thereof; and the petition shall contain such other requisites as may be prescribed by the Supreme Court. The petition must be accompanied with a certified copy of the conclusions of law and fact filed in the cause by the Court of Civil Appeals, with the opinion thereof, together with a certified copy of the judgment in the trial court and of the bond given in the lower court, if any, and if plaintiff in error has given no bond, then the Supreme Court in granting the writ shall specify what bond shall be given, and the plaintiff in error shall file said bond in the trial Court to be approved by the clerk of said Court, and a certified copy thereof shall be at once transmitted to the Supreme Court, and upon the filing of said certified copy, the clerk of the Supreme Court shall

issue citation in error, as may be prescribed by the rules of the Supreme Court.

Article 1011c. If it shall appear to the Supreme Court from an inspection of the petition and record that there is error in said judgment of the Court of Civil Appeals, it shall grant a writ of error returnable in thirty days, in such manner as may be prescribed by said Court.

Article 1011d. The Supreme Court shall from time to time make and promulgate suitable forms, rules and regulations for carrying into effect the foregoing articles relating to the jurisdiction and practice of the Supreme Court."

85 Texas, pp. 633, 634.

By the same amendment to the Constitution the jurisdiction of the Courts of Civil Appeals was thus defined: "Said Courts of Civil Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all civil cases of which the district courts or county courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law, provided, that the decision of said Courts shall be conclusive on all questions of fact brought before them on appeal or error," (85 Texas, 623–624), and by an act of the legislature approved April 13th, 1892, the jurisdiction of these courts was further defined as follows:

"SEC. 5. The appellate jurisdiction of the Courts of Civil Appeals shall extend to civil cases within the limits of their respective districts:

(1) Of which the District Court has original or appellate jurisdiction.

(2) Of which the County Court has original jurisdiction.

(3) Of which the County Court has appellate jurisdiction when the judgment or amount in controversy shall exceed one hundred dollars, exclusive of interest and costs. The judgment of the Courts of Civil Appeals shall be conclusive in all cases upon the facts of the case, and a judgment of such courts shall be conclusive on facts and law in the following cases; nor shall a writ of error be allowed thereto from the Supreme Court, to wit:

(1) Any civil case appealed from a County Court or from a

District Court when under the Constitution a County Court would have had original or appellate jurisdiction to try it except in probate matters and in cases involving the revenue laws of the State or the validity of a statute.

(2) All cases of boundary.

(3) All cases of slander and divorce.

(4) All cases of contested elections of every character other than for State offices, except where the validity of a statute is attacked by the decision.

The judgments of said Courts of Civil Appeals shall be final in all appeals from interlocutory orders appointing receivers or trustees or such other interlocutory appeals as may be allowed by law, and the judgment of said court shall be final in all other cases as to law and facts except where appellate jurisdiction is given to the Supreme Courts, and not made final in said Courts of Civil Appeals."

85 Texas, pp. 640–641.

It is apparent from these provisions that the judgment of the Court of Civil Appeals is not final in this character of case, but that a writ of error lies to review it from the Supreme Court of the State, application for which is thus regulated by rules adopted by the Supreme Court.

84 Texas, p. 695.

"1. Applications for writs of error from this court to the several Courts of Civil Appeals shall consist of a petition addressed to the court, and accompanying transcript, certified under the hand and seal of office of the clerk of the Court of Civil Appeals. The petition, in addition to the requisites prescribed in the statutes, shall show that the applicant has made a motion for a rehearing in the Court of Civil Appeals, presenting distinctly all the points upon which a writ of error is asked, and that the motion has been overruled. The transcript, in addition to the conclusions of fact and law and opinion of the Court of Civil Appeals and of the judgment rendered, and bond given in the trial court as required by the statute, shall also contain a copy of the judgment of the Court of Civil Appeals, together with a copy of the motion for a rehearing filed therein, and of the order

overruling the same. The application shall be deposited with the clerk of this court."

The decisions of this court in Gregory v. McVeigh, 23 Wall, 294, and like cases are not overlooked, yet it is submited that the judgment of the highest court of the State in which a decision of the suit could be had, is that of the Supreme Court and not the Court of Civil Appeals. If there be error in the judgment of the Court of Civil Appeals, it was the duty of the Supreme Court to grant a writ of error, and obviously its refusal to do so is the decision of the highest court of the State which should be reviewed.

Rev. Stats. U. S., Sec. 709.

Logically, it is submitted, this proposition is manifest, but if the opposite view be followed, this case is distinguishable from those referred to. The trial court gave judgment for the State upon five grounds, three of which, at least, namely, the first, third and fifth, are broad enough to support the judgment upon general legal principles, without reference to the supposed federal questions insisted upon. The judgment and opinion of the Court of Civil Appeals put the right of recovery wholly upon the second ground, viz.: Failure to survey the land. Under the law and rules the Supreme Court correctly refused a writ of error if in the opinion of that court the proper judgment was rendered, whatever the reasons given either by the Court of Civil Appeals or the trial court. It may have practically affirmed the judgment of the two lower courts, therefore, upon principles of general jurisprudence and under long established rules of this court the writ should be dismissed. The application for a writ of error to the Supreme Court of the State is not in the record. It is not even shown that the writ was asked upon alleged federal grounds, and we thus have the possible case of a writ of error direct from this court to an inferior court to review its decisions upon federal laws which were never presented to the Supreme Court of the State.

SECOND.

"No question arising under the Constitution or laws of the United States is presented by the record."

It is not entirely clear what federal questions are intended to be urged, but it will be presumed that they are such as may be thought to arise (1) on the passage of the act of January 22, 1883, repealing the acts of July 4, 1879, and March 11, 1881, and (2) the decision of the Court of Civil Appeals that the adoption of field notes does not constitute a legal survey.

1. It is the settled law of this court and the Supreme Court of Texas that prior to a survey of land under the act of July 14th, 1879, no rights became vested, and until a survey is made, the authority of the State to repeal the act exists.

Campbell v. Wade, 132 U. S., 34.
State v. Work, 63 Texas, 148.
White v. Martin, 66 Texas, 340.

As a matter of fact, however, even that question does not arise here. It was not necessary to the decision of the case, and the Court of Civil Appeals did not, in fact, construe the act of 1883, nor base the right of the State to recover upon it.

R. R. Co. v. New York, 12 Wall., 384.

As was said in the statement of the case, it may be added, every section of land for which, it is insisted, payment has been made, or for which judgment is demanded (Record, p. 7), purports to have been surveyed on January 22nd, 1883, the day the act was repealed, or prior thereto (Record, p. 11, paragraphs 4 to 11), and as actually and in contemplation of law, all the land claimed by plaintiffs in error was surveyed, if at all, prior to repeal, the question of the impairment of their rights, because of the repeal, is not presented. Whatever view may be taken of the surveys which purport to have been made on January 22, 1883, it is plain that as to the act of 1883, there was not drawn in question the validity of a statute of or authority exercised under the State of Texas on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such validity. The judgment of the Court of Civil Appeals is that there is no contract, because of the failure to survey the land.

R. R. Co. v. McClure, 10 Wall., 511.

2. If it be conceded that the judgment of the Court of Civil

Appeals, as to the adoption of field notes, in its effect impairs the obligation of the alleged contract, this court would still be without jurisdiction.

Knox. v. Exchange Bank, 12 Wall., 379.

New Orleans Waterworks, v. La. Sugar Co., 125 U. S., 30.

On this question the court quite recently said: "Nor are we authorized by the judiciary act to review this judgment of the State court, because this judgment refuses to give effect to a valid contract or because such judgment in its effect impairs the obligation of a contract. If we did, every case decided in the State courts could be brought here when the party setting up a contract alleged that the court took a different view of its obligation from that which he held."

Morley v. R. R. Co., 146 U. S., 171, 172.

While, in view of these decisions, there seems no occasion to advert to it, the attention of the court is called to the fact that the law governing surveying in Texas is more stringent and exacting under the Revised Statutes adopted in 1879 than under laws existing when the decision in Horton v. Pace, 9 Texas, 84, and like cases, was rendered.

1 Sayles' Early Laws Texas, Arts. 53, 100, 244.

1 Pas. Dig. Laws Texas, Arts. 4522, 4523, 4525, 4528.

Rev. Stats. Texas 1879, Arts. 3840, 3841, 3908.

Thompson v. R. R. Co., 68 Texas, 397.

For convenient comparison, the more direct provisions of the old and new law are printed in parallel columns:

Old Law.	*New Law.*
"The surveys shall be made with great caution, with metallic chains made for the purpose, and care shall be taken that the place of beginning the survey of each parcel of land be established with certaintv, taking the bearing and distance of two permanent objects at least." 1 Sayles' Early Laws, p. 100.	"The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same; and also that such survey was actually made in the field, and that the field notes have been duly recorded, giving book and page." Rev. Stats. Texas 1879, Art. 3908.

It is evident that however similar, these laws are not identical, and the construction is for the State court only. In Wood v. Brady, 150 U. S., 22, 23, this court said: "Plaintiffs in error now contend that the construction given by the Supreme Court, in Taylor v. Palmer, in favor of the validity of such extension, was one upon which Diggins was entitled to rely, and constituted a part of his contract, the obligation of which could not be impaired by a different construction subsequently given. But assuming, for the purposes of this case, that there may be a vested right under an erroneous decision, it is carrying the doctrine to an unwarrantable extent to say that the construction placed by the court upon one statute implies an obligation on its part to put the same construction upon a different statute, though the language of the two may be similar.

"The argument that, the language being similar, a like construction should be put upon both acts, is one properly addressed to the State court; but when that court has assumed to distinguish between the two acts, it is not within our province to say that the distinction is not well taken. The acts in this case, though similar, are not identical, and there is certainly some ground for saying that the construction of the two should not be the same. The point made by the plaintiffs in error that the decision in Beveridge v. Livingstone, was made retroactive is answered by the fact that courts are bound, in their very nature, to declare what the law is and has been, and not what it shall be in the future, and that, if they were absolutely bound by their prior decisions, they would be without the power to correct their own errors."

C. A. CULBERSON,
Attorney General of Texas.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894. No. 603.

E. M. BACON, E. G. GRAVES, and C. C. GIBBS, Trustee, Plaintiffs in Error,

vs.

THE STATE OF TEXAS.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

Brief for Plaintiff in Error, C. C. Gibbs, Trustee, in Opposition to the Motion to Dismiss the writ of Error.

J. HUBLEY ASHTON,
THOMAS D. COBBS,
of Counsel for Plaintiff in Error,
C. C. GIBBS, *Trustee.*

McGILL & WALLACE, Law Printers, Washington, D. C.

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Brief for Plaintiff in Error, C. C. Gibbs, Trustee, in Opposition to the Motion to Dismiss the Writ of Error.

Preliminary Statement.

By an Act of the Legislature of the State of Texas, passed on the 14th of July, 1879, the sale of a portion of its vacant and unappropriated public lands within certain counties, and what was known as the Texas and Pacific Reservation, was authorized. (Laws of 1879, Special Session, c. 52.)

The Act provided that any person, firm, or corporation desiring to purchase any of the lands therein set apart and reserved for sale, might do so by causing the same

to be surveyed by the authorized public surveyor of the county or district in which the land was situated.

It was made the duty of the surveyor, upon the application of a responsible party, designating the lands desired, to make the survey within three months from its date, and within sixty days thereafter to certify to, record, and map the field-notes of the survey, and file them in the General Land Office.

The Act provided that within sixty days after the filing of these papers in the General Land Office, it should be the right of the person, firm or corporation, at whose instance the land had been surveyed, to pay into the treasury of the State the purchase money therefor, at the rate of fifty cents per acre, and that upon the presentation to the Commissioner of the General Land Office of the receipt of the State treasurer for this purchase money, the Commissioner should issue to such person, firm or corporation a patent for the lands.

The Act declared that after the survey of any of the public domain as thus authorized, it should not be lawful for any person to file or locate upon the land thus surveyed.

The Act of July 14, 1879, was amended by an Act passed March 11, 1881, which did not materially affect the provisions of the Act of 1879 in their application to the present case.

On January 22, 1883, the Legislature of Texas passed an Act which withdrew from sale the public lands described in the Act of July 14, 1879, and in effect repealed that Act. (Laws of 1883, c. 3.)

The Court will find copies of the Acts of 1879 and 1883 in the Appendix to this Brief.

The Supreme Court of Texas, giving construction and effect to the Sales Act of July 14, 1879, conclusively de-

termined, in several cases, upon full consideration, that when, in the course of the proceedings to acquire lands, under the Act, the point or step of a survey was reached, there existed a *contract* which gave the applicant, who then became the purchaser, a vested right against the State, upon his complying with his part of the contract to have the lands, of which no subsequent legislation, repealing the Act, could deprive him.

White *v.* Martin (1886), 66 Texas, 340;
Jumbo Cattle Company *v.* Bacon and Graves (1890), 79 Texas, 12.

In the case of *White* v. *Martin*, the party filed, under the Act of 1879, an application for a survey of the lands desired with the surveyor, who surveyed the lands before the repeal of the Act. The field-notes, however, were not returned to and filed in the General Land Office of the State until after the Act was repealed.

The Supreme Court held that the survey gave a vested right to complete the purchase so as to bind the State.

The Supreme Court said:

"How may the applicant become the purchaser? The statute answers the question. He may do so by causing the tract or tracts to be surveyed. When this is done, as the act contemplates, *then*, and not before, *the State contracts*, upon the purchaser's complying with the other requirements of the act, that it will convey to him the land surveyed. When this point was reached, there existed an executory contract which gave the purchaser a vested right upon complying with his part of the contract, to have the lands purchased, of which subsequent legislation can not deprive him. On the faith of the State's promise, the applicant expends money to have the lands surveyed, or incurs obligation to pay. The survey was made for the appellee within the time prescribed, and *thus was vested his right.*"

This decision was affirmed, and the same doctrine applied, in the subsequent and important case of *Jumbo Cattle Company* v. *Bacon and Graves* (*supra*).

In that case the application was filed with the surveyor, and the field notes and surveys were made, before the Act of 1879 was repealed; but the field notes were neither recorded in the surveyor's office, nor filed in the General Land Office, nor was the money paid or tendered, until after the Act was repealed. It was held that the surveys gave a right to perfect the title, which could not be impaired by the subsequent legislation, repealing the Act of 1879, although, as stated, the money was not tendered until after the repeal of the law.

The Supreme Court said:

"The question is as to the effect of the Act of January 22, 1883, which repealed the Acts (of 1879 and 1881) under which appellees made application to purchase the lands. The application had been made and the land had been surveyed when the repealing Act took effect. Had the appellees *then acquired a vested right which the Legislature could not take away?* Or at the time the Act last referred to went into operation was there existing between the State and the appellees a *contract*, which the State could not impair by a repeal of the law under which it was consummated? The ruling in *White* v. *Martin* (66 Tex., 340) is decisive of the question. The only difference between that case and the case now before us is, that in the former the purchase money (which was not tendered until after the repealing Act took effect) was received by the State Treasurer. In the present case, *the Treasurer refused the tender.* It is too plain for argument *that the action of the Treasurer could not affect the right of the parties.* If, notwithstanding the repeal, the purchaser still had the right to complete his purchase by a compliance with the terms of the law under which his application and survey had been made, the Treasurer could not defeat that right by refusing to receive the money. In the case cited, it was held there was a *vested right which was not destroyed by the repealing Act.*"

The Supreme Court further said that, under the Act of July 14, 1879, the expenses of the surveys, in connection with the price to be paid to perfect the title, constituted a sufficient consideration to support the contract. "It cannot be treated," said the Court, "as a mere gratuity or bounty on the part of the State."

There is nothing to the contrary in the case of *Campbell* v. *Wade* (132 U. S., 37), which, indeed, recognizes the principle, affirmed by the Supreme Court of Texas, as above shown, that a right to purchase was conferred by a survey so as to bind the State under the Act of 1879.

A survey, in Texas, has always created a vested right, independently of the statute of July 14, 1879, which itself puts the question at rest by its express provision, that after the survey it shall not be lawful for anyone to *file or locate upon the land.* (Art. 4795, Sayles' Civil Statutes of Texas.)

Under the provisions of the Act of July 14, 1879, and the Act of March 11, 1881, above stated, and which have been construed by the Supreme Court of Texas, as mentioned, Bacon and Graves, plaintiffs in error, on December 1, 1882, applied to purchase the land involved in this suit, which was and is within the Texas and Pacific Reservation. (Application, Rec., p. 21.)

The application, in writing, was made to the Surveyor of the Palo Pinto Land District, in which the land was situated, and that Surveyor was the officer to whom the application for the purchase of the land was properly made. (Record, pp. 10, 11.)

The applicants, Bacon and Graves, were responsible parties, and were entitled to purchase under the law. (Opinion of Court of Civil Appeals, *Ib.*, p. 142, fols. 188, 189.)

The application was received and recorded by the Surveyor on the day it was made, December 1, 1882. (*Ib.*, p. 10.)

The Surveyor, Joel McKee, undertook to survey the land described in the application, and authorized the deputy surveyors under him, E. A. Williams and H. M. Berry, to do so. (*Ib.*, p. 66.)

The Surveyor and his deputies were under oath, and bound to faithfully perform their duties as such. (Rev. Stats. Texas, Articles 3835, 3840.)

On the 17th, 18th, 19th, 20th, 21st, and 22d of January, 1883, the deputy surveyors certified to the field notes of this land as having been surveyed by them according to law. (Findings of the Court, 4 to 10, inclusive; Record, p. 11:)

The certificate of these deputy surveyors on the field notes was prescribed by law and made in accordance therewith. (Subdivision 8, Art. 3908, Rev. Stats. Texas; Rec., pp. 63, 64, 65.)

The Surveyor of Palo Pinto Land District certified to the correctness of the field notes in the manner prescribed by law. (Subdivision 9, Art. 3908, Rev. Stats. Texas; Rec., pp. 53–56, 91–99, 119–124.)

These field notes were recorded in the Surveyor's Office, and returned to and filed in the General Land Office of the State, and the Commissioner received the fees for filing the same, within the time required by law. (Findings of the Court, 3–10, Rec., p. 11.)

The full purchase money for this land was tendered to the State Treasurer, within the time required by law. (Opinion of the Court of Civil Appeals, Rec., p. 143, fols. 189, 190.)

The first tender, made in 1883, was refused, but not because it was claimed that the surveys had not been actually made on the ground. (Rec., pp. 60–62.)

On January 3, 1891, the plaintiffs in error paid to the State treasurer *$149,120* in respect to the purchase money of the land involved in this suit, as follows:

Two hundred and ninety-one sections, of 640 acres each, being the surveys numbered from 1 to 291, both inclusive, in Block "G," Borden and Scurry Counties; also 58 sections, of 640 acres each, being surveys numbered from 1 to 58, both inclusive, in Block "M," in Borden and Scurry Counties; also 117 sections, of 640 acres each, being surveys numbered from 1 to 117, both inclusive, in Block "B," in Scurry County. (Record, p. 59.)

The treasurer of the State in receiving the money for these lands, acted under the advice of the then Attorney General, and the purchase money was deposited in the treasury as provided by the Act of July 14, 1879. (Sec. 10, Act July 14, 1879; Treasurer Lubbock, Rec., p. 63.)

Attorney-General Hogg, who advised the Treasurer to take the money and to issue the receipts in full payment for the land, within a few days thereafter became the Governor of the State, and under section 10 of the Act he directed the Comptroller of Public Accounts to invest the purchase money in interest-bearing bonds of the State or of the United States (see sec. 10, act 1879) and the money was so invested under the Governor's direction, for Treasurer Wortham says (Record, p. 59) the money was mingled with other funds of the State and paid out on the warrants of the Comptroller in accordance with law; and thus the Governor of Texas, the Comptroller of Texas, two Treasurers of Texas, and the Land Commissioner of Texas, approved and confirmed the contract for the sale of this land, as it had been officially made and completed.

The receipts given for the purchase money were in the usual form of a separate receipt for each section of land, and acknowledged such payment to be in full for 640 acres of land under the Act of July 14, 1879. (Wortham, Rec., pp. 58, 59, 60.)

Payment was made only in respect to land surveyed

upon the application to purchase prior to the repeal of the Act of 1879. Interest in other lands was disclaimed.

The deputy surveyors did not actually survey the land on the ground, but the Surveyor and the deputy surveyors, in making out the field notes of the land applied to be purchased and surveyed by Bacon and Graves, adopted the field notes of blocks 97 and 27, in what is known as the *Elgin Survey*, in July, 1883, of a body of lands in Scurry, Borden, and adjoining counties, for the Houston and Texas Central Railway Company, by virtue of certificates issued to that Company by the Commissioner of the General Land Office of the State of Texas. (Findings of the Court, Rec., p. 12.)

Blocks 97 and 27, of the Elgin survey, were actually surveyed on the ground by J. E. Elgin, the Surveyor, in the manner in which it had been customary for surveyors in Texas to survey large bodies of land, and the blocks were divided, in writing up the field notes, into 640-acre surveys. The field notes of the blocks have remained in the General Land Office since they were filed therein, and the lands are platted on the maps of that office.

There are 33,280 acres in block 27, and 611,000 acres in block 97. Deputy Surveyors Berry and Williams, who made the surveys for Bacon and Graves, had, prior to the adoption of the field notes for them, run lines and ascertained corners in blocks 27 and 97, and found them to be as correct as any work of that character in that part of the State, and they were satisfied as to the substantial accuracy of the surveys. The surveys, as far as marked lines and corners were concerned, and in accuracy of work, were equal to or better than any other surveying in that part of the State, except that done for the Texas & Pacific Railway, which was unusually accurate. (Record, pp. 12, 13.)

Berry and Williams both testified that they had been upon the ground, and had done a great deal of survey-

ing, within the limits of block 97, for the parties, and that they were familiar with that block, and knew it to be correctly surveyed. (Rec., p. 68.) They copied in some instances the surveys of the Houston and Texas Central Railway Company, where they knew them to be correct, and they had also before them their field books, and the data obtained by them on the ground in the field, to which they referred for verification. (Rec., pp. 67, 69, 70.) They were familiar with the surveys of block 97, and they had no difficulty in writing correct field notes.

These field notes properly ascertained and correctly identified the land, and segregated it from the public domain.

The Court of Civil Appeals found and decided that the original tender of the money, in the first instance, was sufficient, and in time, and that the treasurer could not defeat the right of the parties to purchase by refusing to receive their money. (Rec., p. 143, fol. 190, where the Court cites the decision in *Jumbo Cattle Co.* v. *Bacon and Graves*, 79 Texas, 12.)

The defendants, in the answer interposed by them, in this suit of the State, claimed the 298,240 acres of land therein involved, by purchase and as purchasers from the State, under the Act of July 17, 1879, and alleged that having in all respects fully complied, as set forth, with the provisions of the law in respect to the purchase of the lands, under which they were offered for sale by the plaintiff, their rights thereto became and were vested, under the law, and that the Act of the Legislature subsequent thereto, namely, the Act of January 22, 1883, repealing that law, was, under *Art. 2, section 10, subdivision 1*, of the Constitution of the United States, null and void, as affecting the vested rights of the defendants. (Answer, Rec., p. 4, folio 8; p. 7, fol. 11.)

The question was thus directly presented upon the

facts alleged in the pleadings, as to whether or not there was a contract between the parties in respect to the purchase of the lands, involved in the suit, and claimed by the defendants, under the Act of July 17, 1879, the obligation of which was impaired by the subsequent Act of January 22, 1883, repealing the Act of July 17, 1879, in violation of the Constitution of the United States.

The Federal question as to the existence and effect of the contract alleged by the defendants, under the Act of July 17, 1879, and the alleged impairment of the obligation of that contract, by the Act of January 22, 1883, was thus expressly presented by the pleadings in the suit.

The validity of the Act of 1883 as respects the alleged contract with the State under the Act of 1879, and the rights of the defendants thereunder, was thus distinctly drawn in question as repugnant to the Constitution of the United States, and a right under that Constitution was thus specially set up and claimed by the defendants, in their answer in the case.

In the Court of Civil Appeals, on the appeal by the defendants from the judgment of the District Court, the assignment of errors, by the defendants, presented the question as to whether they had acquired a vested right to the lands by the survey thereof, as made for them, under the Act of 1879, prior to the repeal of that Act, which could not be affected by the repealing Act of 1883, and the question as to the effect of the decisions of the Supreme Court of Texas in relation to surveying lands, as establishing a *rule of property* upon the subject, under which the lands in controversy were in all respects legally surveyed for the defendants upon their application under the Act of 1879. (Record, p. 134, fol. 174; p. 135, fol. 175.)

The Court of Civil Appeals held that there was no contract between the parties by reason of the surveys as made for the defendants, under the Act of July 17, 1879, and the Court thus necessarily gave effect to the repealing Act of January 22, 1883, which the defendants claimed, as stated, impaired the obligation of the contract in re-

spect to the purchase of the lands, upon which they relied in the suit. (Opinion of the Court of Civil Appeals, Rec., p. 138; p. 141, fol., 186.)

Motions for rehearing were made by Bacon and Graves, and C. C. Gibbs, trustee, in the Court of Civil Appeals, which were overruled by that court. (Motion of Bacon and Graves, Rec., pp. 147–154; motion of C. C. Gibbs, *Ib.*, pp. 155–162.)

The former set forth, among other grounds, for a rehearing, that the Court of Civil Appeals erred in not holding that by reason of the surveys, as made, the appellants had an executory *contract* with the State of Texas, which entitled them to the lands in controversy, upon the payment of the purchase money. (Rec., p. 151, fol. 211.)

It maintained that the Court ignored a *rule of property*, established by repeated decisions of the Supreme Court, namely the rule that an actual survey in the field by an official surveyor may be subsequently adopted by the surveyor who made it, or by any other official surveyor who believes the survey to be a correct one, and a survey so made becomes the official act of the surveyor who made it, by adoption, and is in contemplation of law a valid survey, and a legal appropriation of the public land, and this action was destructive of the vested rights of the appellants, and contrary to Art. 2, Sec. 10, and the 14th Article of Amendments, of the Constitution of the United States. (Rec., p. 151.)

The latter motion, also, maintained that the Court of Civil Appeals erred in not holding that the surveys made for appellants were legal surveys, and appropriated the lands in controversy, and gave them a vested right thereto, and that the deprivation of their property, through a new rule, and a new construction of the laws of the State, as set forth, was the taking of their property without due process of law, constituted an impairment of the obligations of the contract entered into between the State and appellants, and was thus in violation of the 10th

Section of the Second Article of the Constitution of the United States, which provides that "*no State shall impair the obligation of contracts,*" and in violation of the 14th Article of Amendments to the Constitution of the United States, which provides that "*No State shall deprive any person of life, liberty, or property without due process of law.*"

After the Court of Civil Appeals had overruled the motions for a rehearing, the appellants duly presented an application to the Supreme Court of the State for a writ of error to the Court of Civil Appeals, which was refused by the Supreme Court, by an order entered on March 9, 1893, a copy of which is in the present record. (Rec., p. 162.)

This order was sent to the Clerk of the Court of Civil Appeals, under the rules of the Supreme Court, which provide that upon a refusal by that Court of an application for a writ of error, the Clerk shall transmit to the Clerk of the Court of Civil Appeals, to which the writ of error was sought to be sued out, a certified copy of the order denying such applicaiion. (Rules of the Supreme Court, 84 Texas, 695-697.)

The petition for the writ of error, in such case remains, it is supposed, in the office of the Clerk of the Supreme Court.

Under the rules of the Supreme Court, no application for a writ of error can be entertained in a case wherein a motion for rehearing has not been made in the Court of Civil Appeals, and overruled by that Court; and among the papers required to be presented to the Supreme Court, with the petition for a writ of error, is a copy of the motion for rehearing in the Court of Civil Appeals. (Rule 1 of the Supreme Court, 84 Texas, p. 695.)

The assignment of errors, filed in the court below, on the allowance of the present writ of error, distinctly presents the Federal questions raised upon the record, and which, it is maintained, were erroneously decided by the Court of Civil Appeals in affirming the judgment of the District Court in this case. (Assignment of Errors, Rec., pp. 711–176.)

ARGUMENT ON THE MOTION.

FIRST.

The judgment of the Court of Civil Appeals for the Second Judicial District of the State of Texas is the judgment of the highest Court of the State in which a decision in the suit could be had, and this Court may re-examine the same upon a writ of error, under the provisions of Section 709 of the Revised Statutes of the United States.

The Court of Civil Appeals has appellate jurisdiction of all cases appealed from the District Courts. (Acts Leg., p. 22, Sec. 5, 22 Leg., called Sess. 1892.)

Appeals to the Court of Civil Appeals are perfected by making up the prescribed record, consisting of pleadings, statement of facts, etc., and filing such record in that court. (Acts 22 Leg., p. 29, Sec. 24, Called Sess. 1892.) This record remains in the Court of Civil Appeals.

The Supreme Court has appellate jurisdiction of all civil cases of which the Court of Civil Appeals has not final jurisdiction. (22 Leg., p. 20, Called Sess., Art. 1011.)

All cases are carried to the Supreme Court upon writs of error issued from the Supreme Court to the Courts of Civil Appeals. (Art. 1011 a.)

A party desiring to sue out a writ of error before the Supreme Court is required to present a petition to that court, which must be accompanied by a certified copy of the conclusions of law and fact, filed in the cause by the Court of Civil Appeals, with the opinion of that court, together with a certified copy of the judgment in the trial court, and of the bond given in the lower court. (Art. 1011 b.)

If it appears to the Supreme Court from an inspection of the petition, and this *partial* record, that there is

error, the writ is granted returnable in thirty days. (Art. 1011 c.)

When a writ of error is issued and served on the Court of Civil Appeals, the transcript of the *record*, on file in that Court, is forwarded by the Clerk of the Court of Civil Appeals to the Clerk of the Supreme Court. The Clerk of the Supreme Court files this record, and gives notice, and the case then stands for submission in the Supreme Court on briefs, etc., filed below. (Art. 1039.) The Supreme Court will then render judgment reversing or affirming the judgment. (Arts. 1043–1049.) In case a writ of error is granted, the Clerk of the Court of Civil Appeals and the Court of Civil Appeals have no further jurisdiction or control of the record. All process is issued from the Supreme Court. (Arts. 1050, 1056, 1057.)

If no writ is granted the Clerk of the Court of Civil Appeals retains control of the record, and makes all further necessary orders to carry out the judgment of the Court of Civil Appeals. (85 Tex.; Sec. 38, p. 646, Act April 13, 1892.)

When a writ of error is refused by the Supreme Court, no reason is given by that Court, and an order is entered denying the application. (See, Rules 1, 2, 3, 4, 5, 6 of the Supreme Court, 84 Texas, 695–697.)

It thus appears that parties are not permitted to take the judgments of the Courts of Civil Appeals to the Supreme Court for review, as a matter of right, and that leave for that purpose upon special application, and a prescribed record, must first be obtained.

The order of the Supreme Court, refusing an application for a writ of error, forever *closes the door of that Court* against the suit, in the regular order of proceedings under the law governing the practice in Texas.

The judgment of the Court of Civil Appeals, upon the denial of the application for a writ of error, by the Supreme Court, in any case, is thus the judgment of the highest Court of the State in which a decision of the suit could be had.

A judgment of affirmance or reversal is not rendered by the Supreme Court, except upon a writ of error issued by it upon an order granting the application for such writ, and after the return of the transcript of the full record in the case, by the Court of Civil Appeals to which the writ is directed.

The rules of the Supreme Court prescribe as follows:

"*4.* Upon a refusal by the Court of an application for a writ of error, the Clerk of this Court shall transmit, with the least practicable delay, to the Clerk of the Court of Civil Appeals, to which the writ of error was sought to be sued out, a certified copy of the order denying such application.

"*5. If the application be granted, the clerk shall issue a writ of error to the judges of the court; the judgment of which is sought to be reversed, advising them that the writ of error has been granted and directing them to cause to be transmitted forthwith to this court the original transcript of the proceedings of the trial court, together with all briefs and arguments on file in the case;* and the clerk shall also issue a citation to the defendant, or defendants in error, or to his or their attorneys of record, notifying him or them that the writ of error has been granted, and of the date thereof, and to appear and defend the same. Said citation shall be returnable in ten days, and in the event it be not served the clerk shall issue other successive citations until due service is had. Service of the citation upon one attorney will be deemed service upon all parties represented by him. If no bond be required the citation and writ of error shall issue immediately upon the granting of the application. If a bond be required the writ shall issue upon receipt of the duly-certified copy of the bond prescribed by the statute. Unless further time be allowed by special order of the court in the particular case, the certified copy must be

filed in this court within ten days from the granting of the application. If the copy be not so filed the application will be dismissed by the court of its own motion.

"*6. When service of the citation in error shall have been had, and the original transcripts and briefs sent up to this court by the Court of Civil Appeals,* it shall be the duty of the clerk to put the case upon the trial docket, and to mark upon the file the number of the case as shown upon such docket. Cases upon the trial docket shall be numbered consecutively in the order in which they are entered thereon." (84 Texas, 695–697.)

It thus appears that until a writ of error has been actually granted by the Supreme Court, and the same is duly returned with the transcript of the record on file in the Court of Civil Appeals, the Supreme Court has no record of the case, which could be sent to this Court in obedience to its writ of error, which would necessarily, therefore, be inoperative and ineffective if directed to the Supreme Court, and not to the Court of Civil Appeals. (Gregory *v.* McVeigh, 23 Wall., 294; Atherton *v.* Fowler, 91 U. S., 143, 146.)

Chief Justice Waite, speaking for the Court, in *Atherton* v. *Fowler*, said: "We can only examine the 'final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had.' (*Rev. Stat.*, sec. 709.) For the purposes of such a re-examination, we require the *record* upon which the judgment or decree was given, and we send out our writ of error to bring it here. That writ is to operate on the court having the record, and not upon the parties. (Cohen *v.* Virginia, 6 Wheat., 410.) The citation goes to the parties, and brings them before us. The writ of error, therefore, is properly 'directed to the court which holds the proceedings as part of its own records, and exercises judicial power over them.'" (Hunt *v.* Palas, 4 How., 590.) If the highest court of the State retains the record, the writ should go there, as that court can best certify to us the proceedings upon which it has acted and given judgment."

SECOND

Where the judgment of the highest Court of a State, by its terms or necessary operation, gives effect to some provision of the State law which is claimed by the unsuccessful party to impair the contract relied on, this Court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the State law complained of impairs its obligation.

This principle has been recently reaffirmed, upon a full review of the previous cases, which established the doctrine, in the opinion of the Court, delivered by Mr. Justice Jackson, in the case of *Mobile & Ohio Railroad* v. *Tennessee* (153 U. S., 486).

The leading case is *Jefferson Bank* v. *Skelly* (1 Black, 436, 443), in which the Court said:

"Its (the Supreme Court) rule of interpretation has invariably been that the constructions given by the courts of the States to *State legislation* and to State constitutions have been conclusive upon this Court *with a single exception*, and that is when it has been called upon to interpret the *contracts* of States, '*though they have been made in the forms of law*,' or by the instrumentality of a State's authorized functionaries, in conformity with State legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State whenever such a Court shall adjudge that *not to be a contract* which has been alleged, in the forms of legal proceedings, by a litigant, to be *one* within the meaning of that clause of the Constitution of the United States which inhibits the States from passing laws impairing the obligation of contracts. Of what use would the appellate power be to a litigant who feels himself aggrieved by some particular State legislation, if this Court could not decide independently of all adjudication by the Supreme Court of a State whether or not the phraseology of an

instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by a Supreme Court of a State?"

In *Mobile & Ohio Railroad* v. *Tennessee* the Court said: "The grounds upon which the Supreme Court of the State held that the contract claimed by the Railroad Company was invalid, in no way affects the jurisdiction of this Court. The *legal existence of the contract itself*, and its proper construction, is necessarily involved in the *question of the alleged impairment of the obligation thereof*."

In *Bryan* v. *Board of Education* (151 U. S., 639, 650), the Court, speaking by Mr. Justice Shiras, said: "So that it is necessary to inquire as to the *existence and effect of the alleged contract*. And that question must be determined by this Court upon its own judgment, independently of any adjudication by the State Court."

In *Wright* v. *Nagle* (101 U. S., 794), Chief Justice Waite, speaking for the Court, said: "If the Court below *erred in construing the statute*, and in holding that there was *no contract*, then the question is presented whether the subsequent action of the Commissioners is equivalent to a law of the State impairing the obligation of the contract as it was made. In this way a Federal question is raised upon the record, which gives us jurisdiction."

The Court, also, said, in that case, that ordinarily the construction of the State Statute, by the State Court, would be conclusive here. "One exception, however, exists to this rule, and that is when the State Court has been called upon to interpret the *contracts of States*, 'though they have been made in the forms of law, or by

he instrumentality of a State's authorized functionaries in conformity with State legislation.' "

It is quite clear, therefore, that the learned Attorney General can not maintain his position, in this case, that this Court can not review the judgment of the Court of Civil Appeals, because that judgment proceeded upon the ground that there was no contract between the State and the plaintiffs in error.

It is for this Court to review the decision of the court below upon the question of the legal existence of the contract asserted by the plaintiffs in error, under the exception to the rule in regard to the authority of the construction placed upon State legislation by the Courts of the State.

The question of contract or no contract is one, therefore, for this Court to adjudge upon the present writ of error.

It can not be pretended that the lawful repeal of a statute can constitutionally be made to destroy contracts which have been entered into under it. The constitutional doctrine is well settled that these contracts being legal when made they remain valid, notwithstanding the repeal. (McCauley *v.* Brooks, Opinion by Mr. Chief-Justice Field, 16 Cal., 1; Commonwealth *v.* New Bedford Bridge, 2 Gray, 339; State *v.* Phalen, 3 Harr., 441; State *v.* Hawthorn, 9 Mo., 389.)

THIRD.

The rule declared by this Court, as above stated, leaves no room to doubt the jurisdiction of this Court, in the present case, to determine whether or not the plaintiffs in error had a valid contract or vested right in respect to the purchase of the lands in question, under the Sales Act of July 14, 1879, which could not be lawfully impaired or affected by the subsequent repeal of that act as effected by the Act of January 22, 1883, and for that purpose to decide for itself whether or not the surveys of the land, as made by the accredited officers of the State upon the application of the plaintiffs in error to purchase the lands, and for a survey of the same, under the Act of 1879, were surveys which bound the State, and gave the parties a vested contract right to pay for the land as against the State notwithstanding the repeal of that Act.

The Court of Civil Appeals, in this case, said:

"It will be borne in mind that the question presented for decision in this case is not whether the field notes made out as indicated in the first part of this opinion constituted such a *survey* as the officers of the State could adopt should they see proper to do so, nor whether it is such an absolute nullity as could be taken advantage of by a *third* party, but the question is, does it constitute such a *survey* within the meaning of the law, as the State can be compelled to accept in opposition to its wishes? *The appellants are seeking to enforce against the State an executory contract, and base their right to do this upon the ground that they have complied with their part of such contract.* In such case we think they should show that they have obtained the field notes in the manner the State said they should be obtained in its proposition, and not that they have got as good field notes in some other way as would have been obtained had they complied with the State's offer." (Record, p. 141, fol. 186.)

The Court of Civil Appeals expressly held that the tender of the plaintiffs in error, in 1883, was good, and made in due time under the Act of 1879.

The Court in their opinion said:

"By the decision in the *Jumbo Cattle Co.* v. *Bacon & Graves*, we understand it to be settled that the *tender was in time*, and that the Treasurer could not defeat their *right to purchase by refusing to receive the money.*"

The Treasurer subsequently took the money of the plaintiffs in error ($149,120), and it has been used by the State in the same manner as other moneys received for lands purchased under the Act of 1879.

One of the questions for this Court, therefore, is, whether or not by the true construction and effect of the Act of 1879, and the law of the State of Texas in relation to surveys, the surveys made for the plaintiffs upon their application to purchase the lands, under the Act of 1879, constituted such surveys as conferred a right upon them to have and pay for the lands, according to the offer of the State, as against the repealing Act of 1883.

The decision of the State Court upon that question, in this case, is not binding in any manner upon this Court, which has the undoubted right to determine for itself, and upon its own view of the law of Texas, whether or not the surveys made for the plaintiffs in error by the officers of the State, under their official oaths, were valid surveys, conformable to the Act of 1879, which vested in the parties the right to have the land by paying or tendering the purchase money within the time prescribed by that Act, which could not be lawfully taken away by the subsequent repeal of that Act by the Legislature.

The jurisdiction of this Court would be simply illusory, if it were obliged merely to follow and give effect to the determination of the State Court, in this case, upon the question of the validity of the surveys relied on by the

plaintiffs in error, under the Act of 1879, upon which hinges the question, in the case, whether there was a contract with the State or a vested right in the plaintiffs in error, under the Act of 1879, which could not be impaired, or affected, by the repeal of that Act, consistently with the Constitution of the United States.

It is unnecessary upon this motion to maintain that the surveys in question were valid surveys, under the law of Texas, but it may be stated, that under the statutory requirement in respect to surveying public lands, in Texas, the Supreme Court of that State for more than half a century, has consistently held that it was competent, legal, and valid to survey such lands in the manner in which the lands involved in this suit were surveyed for the plaintiffs in error upon their application to purchase the same under the Act of 1879.

It has always been held in Texas that a survey of land by virtue of a valid right creates, establishes and fixes a vested interest in behalf of the owner of the survey.

Hamilton *v.* Avery, . . 20 Tex., p. 635;
Sherwood *v.* Fleming, . 25 Supp. Tex. Rep., p. 428;
Elliott *v.* Mitchell, . . 28 Tex., p. 109;
Elliott *v.* Mitchell, . . 47 Tex., p. 448;
Milam County *v.* Bateman, 54 Tex., p. 163;
Duren *v.* H. & T. C. Ry. Co., 86 Tex., p. 291.

Among the numerous decisions of the Supreme Court of Texas establishing the validity of the surveys made for Bacon and Graves, the following cases may be mentioned:

Howard v. *Perry*, 7 Tex., p. 266:

"The survey of a deputy surveyor, although made for himself on a certificate belonging to himself, when approved by the District surveyor, became the act of the latter and was so far valid."

Horton v. *Pace*, 9 Texas, 84:

"We do not question the right of a surveyor to adopt a previous survey which he thinks correct."

Also, *Jenkins* v. *Chambers*, *id.*, 232, to the same effect.

Styles v. *Gray*, 10 Texas, 506:

"Suppose that the survey had been made upon a certificate which was afterwards raised, or on one found to be invalid, there can be no sort of objection to the surveyor's applying his work to a good and valid certificate previously located. It would be worse than useless to require him to do his work over again when he could verify its correctness without such useless labor and expense."

Stafford v. *King*, 30 Texas, 269:

"It is the duty of the surveyor to run round the land located and intended to be embraced by the survey and patent, and see that such objects are designated on it, as will clearly point out and identify the locality and boundaries of the tract; * * * but if it be established by undoubted evidence, that the land was not in fact surveyed, yet, as the omission was the fault of the government officer and not the owner, it would seem extremely unjust to deprive him of the land by holding the patent to be void, if the land can, by any reasonable evidence, be identified."

Jones v. *Burnett*, 46 Texas, 292:

"The evidence makes it quite probable that in surveying King's block all the lines were not run. There is no positive evidence on the subject, but circumstantial evidence points strongly to the conclusion that some of the lines were actually run out. If such was the fact, it would not invalidate the patent, provided the land can be identified with reasonable certainty."

Thomson v. *Railroad Company*, 68 Texas, 392:

"The County surveyor could, without making an actual survey, avail himself of the knowledge obtained by a former survey, and make out field notes by virtue of a valid land certificate, or an authorized copy thereof in his possession, whereby land could be as effectually severed from the public domain as though it had been actually surveyed by virtue of the certificate which appropriated it."

Sanborn et al v. *Gunter & Munson*, 84 Texas, 284:

"Actual surveys by which lands granted by the State shall be specifically described and distinguished have always been contemplated and prescribed by our laws. It is true, that under the laws when the surveys now in controversy were made for the railway company it was not always regarded as indispensable, however desirable, that the lines of the survey should be actually run and measured on the ground."

Doswell v. *De la Lanzo*, 20 Howard, U. S., 34:

"If the surveys were void when made west of the Nueces as being without the limits of San Patricio County, they were made valid by the subsequent approval of the county surveyor to the county limits and extended west of that river."

The latest and one of the strongest cases approving the adoption of surveys, is the case of *Duren* v. *H. & T. C. Ry. Co.* (86 Tex., p. 291), in the following language:

"It seems that the survey and field notes were made by an agent of the locators, and were *approved and adopted by the lawful surveyor*. This is certainly a practice not to be commended, and one which it would seem the Legislature did not contemplate. Therefore, if the question were an *open one*, we might have difficulty in reaching the conclusion that a survey made by a locator for his own benefit could be *adopted by the surveyor so as to give it any validity*. But it was held in *Howard* v. *Perry, supra*, that this could be done. It is true that in that case the locator was himself the deputy surveyor; but the court seem to attach no importance to

that fact. In the opinion they say: 'But it is objected to the defendant's survey that it was made by and for himself. It is, however, approved by the district surveyor, and thereby became, in contemplation of law, his act.' And we apprehend that the deputy had no authority to make a survey for himself, and that validity of the survey depended wholly upon the approval of the district surveyor. Such is our construction of the opinion, and it is decisive of the point before us. *Whatever our own views may be upon the question as an original one, it has been too long recognized as a rule of property in every department of the State government to be now overturned.*"

The Court of Civil Appeals having referred to some of the decisions in Texas recognizing the construction placed upon the statutes in respect to surveying lands, for the purpose of showing that all the statutory laws required lands to be surveyed in the field, or on the ground, the statutory provisions were paralleled, and are partially set out, in the motion for rehearing, on page 157 of the printed record, and fully set out in the brief of Bacon and Graves, upon the present motion, to which we refer.

That the surveys for the Houston and Texas Central Railway were made by the proper surveyor is shown by the case of *Kinmarle & Hirsch* v. *H. and T. C. Ry. Co.* (78 Tex., p. 686).

The case of *Cox* v. *Railway* (*68 Tex.*), cited by the Attorney General, has no application to this case.

The Court of Civil Appeals, in its opinion, as has been seen, recognized and admitted the settled doctrine of the Supreme Court of Texas, under the Sales Act of 1879, that when in the course of the proceedings for the purchase of the lands offered for sale by that Act, the point or step of a *survey* was reached, a valid and binding contract with the State was created, which gave the purchaser a vested right upon his complying with his part

of the contract, to have and pay for the lands, of which no subsequent legislation of the State, repealing the Act of 1879, could lawfully and constitutionally deprive him.

The cases of *White* v. *Martin* (66 Tex., 340), and *Jumbo Cattle Co.* v. *Bacon and Graves* (79 Texas, 12), by which that doctrine was established, are cited at the beginning of this Brief, as determining the construction given to the Act of 1879 by the Supreme Court of Texas.

The Court of Civil Appeals *avoided* and *evaded* the effect and the authority of these decisions, and sustained the validity of the repealing Act of 1883, as against the plaintiffs in error, and the right asserted by them to the lands in controversy, under the Act of 1879, and the decisions of the Supreme Court of Texas, by saying and holding that the surveys were invalid, or not such as bound the State, or the State was compelled to accept as vesting any rights in the parties, and that, therefore, there was no contract, under the decisions of the Supreme Court, between the State and the plaintiffs in error, the obligation of which was impaired by the legislature of the State, in the Act of 1883, repealing the Act of 1879.

The question for this Court upon the present writ of error, therefore, is whether the surveys under which the plaintiffs in error claimed a vested right to have and to pay for the lands in controversy, of which subsequent legislation could not deprive them, were legal and valid surveys, by the law of Texas, which created a contract, under the Act of 1879, between the State and the plaintiffs in error, which the State could not impair, consistently with the Constitution of the United States, by a repeal of the Act of 1879, under which it was consummated.

If the Court below erred, as we believe it did, in construing the pertinent statutes in regard to surveys in Texas, and in holding that there was no contract between the plaintiffs in error and the State, under the Act of

1879, by the surveys as made under that Act for the plaintiffs in error, then, it is clear that the effect of the Act of 1883, repealing the Act of 1879, was to impair the obligation of a valid contract between the State and the plaintiffs in error, and the judgment of the Court below must necessarily be reversed upon this writ of error.

The question as to whether or not the repealing Act of 1883, in violation of the Constitution of the United States, impaired the obligation of the contract asserted between the State and the plaintiffs in error, is distinctly raised and presented upon the record in the Court below.

FOURTH.

A contract in any way dependent upon a statute, or upon the uniform judicial construction of a statute by the Courts of the State, which is valid by the terms of the Statute as construed by the Courts at the time of its execution, or when it is entered into, can not be rendered invalid, either by a subsequent change of the Statute by the Legislature, or by a subsequent change of the judicial construction of the Statute by the Courts of the State.

The pertinent authorities in the decisions of this Court upon the subject are these:

Ohio Life Ins. and Trust Co. *v.* Debolt, 16 How., 416;
Leffingwell *v.* Warren, 2 Bl., 603;
Gelpcke *v.* Dubuque, 1 Wall., 205;
Chicago *v.* Sheldon, 9 Wall., 50, 56;
Olcott *v.* Supervisors, 16 Wall., 678, 691;
Douglass *v.* County of Pike, 101 U. S., 677, 686;
Louisiana *v.* Pilsbury, 105 U. S., 278, 295;
Anderson *v.* Santa Anna, 116 U. S., 356, 361, 362.

Chief-Justice Taney, speaking for the Court, in *Ohio Life Ins. and Trust Co.* v. *Debolt*, said: "The sound and true rule is, that if the contract, when made, was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation can not be impaired by any subsequent act of the legislature of the State, or decision of its Courts, altering the construction of the law."

Chief-Justice Waite, delivering the opinion of the Court, in *Douglass* v. *County of Pike*, said: "The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, *to all intents and purposes, the same in its effects on contracts as an amendment of the law by means of a legislative enactment.*"

The subject is discussed by Judge Hare, in his Lectures on American Constitutional Law (Lecture XXXII, Vol. 1).

"The appropriate function of the tribunals," says Judge Hare, "is *jus dicere*, to declare the law and not to make it; and the law will be presumed to have been as the Courts held, although the contrary is apparent. It is clear that the safeguard which the Constitution provides for contracts is obligatory on all the branches of the State Government, and should not be set aside or evaded by the Judiciary, or under color of a judgment, which, though in form declaratory, virtually impairs constitutional rights, by introducing novel rules or abrogating

existing remedies. * * * It is not less clear that the Judiciary cannot impair the obligation of a contract by putting a manifestly erroneous interpretation on the Statutes under which the contract was executed, and which constitute its obligation. If, for instance, the highest tribunal of a State declares, contrary to the plain intent of a prior statute, that a mandamus cannot be issued to compel a municipal corporation to levy and collect the taxes requisite for the payment of its debts, the rights of the creditors are as much violated as if the statute were repealed. and the Federal tribunals may afford redress. (Butz *v.* City of Muscatine, 8 Wall., 583.) There is not, in the ordinary sense of the term, a law impairing the obligation of the contract, but there is an erroneous interpretation of the law, which has practically the same effect. * * * If the law is defined, although erroneously; by a court of last resort, the subsequent enunciation of a different rule will have the same injurious effect on rights acquired during the interval as if the change were legislative instead of judicial. It follows that a State Court cannot impair the obligation of a contract which has been made on the faith of the interpretation which has been put on a local enactment by *enunciating a new or inconsistent rule.*

"It is immaterial, as regards the application of this principle, that the former decision is unsound, and could not stand the test of legal criticism, because it was the only source to which the citizen could look for guidance. The question in *Louisiana* v. *Pilsbury* was, could the Supreme Court of Louisiana, by changing the view which it had taken of a statute, invalidate negotiable bonds which would have been obligatory had the former judgment been allowed to stand, and was decided negatively on the following grounds: 'Whether the construction originally placed upon the clause of the Constitution of

1845 was or was not erroneous will not be considered in determining the validity of the bonds. The exposition given by the highest judicial tribunal of the State must be taken as correct, so far as contracts made under the act are concerned. Their validity and obligation can not be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law as to construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. The statute, as thus expounded, determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts.' "

It was in a jealous care of rights derived from contracts, and in obedience to the letter and spirit of the Constitution of the United States, that this Court, in a long series of cases of various circumstances, adopted the principle, that if the State Courts have held a certain view of the law upon which contracts were made and rights acquired, and afterwards those Courts have changed their decisions, the new decisions will not be followed in the Courts of the United States, in cases to enforce those contracts, but the law of the State, at the time those rights were acquired, will be rigidly applied and enforced.

"The obligation of a contract," this Court has said, "consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by one party, and the right acquired by the other." (McCracken *v.* Hayward, 2 How., 608.)

"The obligation of a contract is the *law* which binds

the parties to perform their agreement." (Ogden *v.* Saunders, 12 Wh., 213.)

The term "law," as used by this Court, and agreeably to the doctrines declared by it, in the cases referred to above, is broad and comprehensive enough to include rules of property and conduct enunciated by the Courts as well as those laid down by the Legislature.

And it has been expressly adjudged by this Court that the exposition given to a statute by the highest judicial tribunal of the State, so far as contract obligations incurred under it are concerned, constitutes a part of the Statute, as much as if embodied in it.

It is, therefore, a law of the State.

It follows logically, and, indeed, as a necessary corollary, that where a contract which is valid agreeably to a Statute of the State, as expounded by its highest Court, is set aside by a subsequent decision of that Court, which introduces a new and different rule, the obligation of the contract is impaired by arbitrary *judicial legislation*, and by a *law* of the State in the sense of the constitutional prohibition, and that it is within the jurisdiction and power of this Court to afford redress.

The Constitution of the United States is binding on the State as an organic whole, and on all departments of its government, and an antecedent obligation which is impaired retroactively, through a change of decision by the Judiciary, is impaired by a law of the State, in the just sense of the contract clause of the Constitution. (See, Menges *v.* Dentler, 33 Pa., 495; Dodge *v.* Woolsey, 18 How., 331; Delmas *v.* Insurance Co., 14 Wall., 661; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S., 672.)

FIFTH.

The Court of Civil Appeals, the Court below, could not, by changing the view which had been taken and accepted for fifty years under the statutory requirements as to surveying public lands in Texas, invalidate the surveys of the lands involved in this case, and thereby destroy the contract rights of the plaintiffs in error acquired under the rule in force at the time their surveys were made by the officers of the State of Texas.

The Sales Act of July 14, 1879, provided, in its seventh section, for the survey of lands sold thereunder, in view of the then existing law, and the construction and effect given to that law by all the departments of the Government of Texas, and not in view of Article 3908 of the Revised Statutes, which did not take effect until the September thereafter, as we understand. It is clear, however, that Article 3908 made no change whatever in the then existing law of Texas with regard to surveying the public lands, which required such lands to be surveyed on the ground, and that the Article only continued in force the law as it before existed, and did not require or authorize the Court below to change, in this case, the established rule as to surveys of the public lands.

The object of subdivision 8 of Article 3908 was to provide for the official attestation of the correctness of the survey, that it was made according to law, and that it was actually made in the field. Under former laws, the surveyor was required to certify the correctness of the survey; and it is not questioned that the laws in force prior to the Revised Statutes contemplated and required, as has been said, an actual survey on the ground; so that if this provision for an official certificate, as evidence of what had been done, contemplated and required an actual survey on the ground, it was merely declaratory of the requirement of the law in force prior thereto, and a

continuance of that law, and not a new enactment with reference to actual surveys in the field.

The surveyors who made the surveys, in this case, certified to the correctness of the surveys, and that they were actually made in the field according to law.

The official surveys are substantially accurate and definite, and they were actually made in the field, by Elgin, and Berry and Williams had, by their own work in the field, ascertained that the survey was so made, and the finding of the Court is, that it is one of the best surveyed blocks in that part of the State. It was unnecessary for the surveyors to walk over the ground *again*. They had been over the ground, testing largely the surveys adopted by them, having books containing in some instances their own field work made at the time, which enabled them to prepare correct field notes of the work for the plaintiffs in error.

The surveyors were the agents of the State, authorized and required to survey the lands, and make the contract, which is one that the State of Texas can not, by legislative enactment, or judicial decision, under the Constitution of the United States, destroy or impair.

An examination of the authorities, in the Texas Reports, which have been cited, will show that every case in which the survey was made by *adoption*, is weaker than the case at bar, and if the State had not been a party here, as intimated by the Court of Civil Appeals, the survey would no doubt have been sustained.

If the survey would have been good as against third parties, no reason is perceived why it was not good as against the State, under the Act of 1879, for the survey was made in accordance with the laws of the State as then expounded by all its departments, and as administered by its courts of justice.

The survey can not, therefore, be impugned by the State of Texas, which had *itself* enacted and construed the laws under which it was made.

SIXTH.

If this judgment is to stand, the State of Texas, by the action of its public authorities, judicial and executive, has deprived the plaintiffs in error not only of the land, but, also, of $149,120 of their money paid by them in respect to the purchase of the land, under and upon the faith of the laws of the State as they had been previously expounded by its judicial tribunals, and as they were understood at the time of all the transactions between the State and the plaintiffs in error. The State cannot have and recover the property thus paid for, consistently with the Constitution of the United States, before and without restoring and returning to the plaintiffs in error the money which it received from them as the purchase money for the property.

The suit by the State, in this case, was, in effect, an action to rescind the contract made and executed between it and the plaintiffs in error, under a new construction sought to be put upon the laws of the State, and to be retroactively applied in this case, and as respects this property; but before the State can recover the property upon such a changed construction of its laws, it must restore to the plaintiffs in error the fruits of the contract, as received by it from them, and now enjoyed by it.

The State cannot be allowed to recover the land upon a new and changed judicial construction of the statutes in force at the period of the transactions, and, at the same time, keep the money it received for the property.

This would amount to the confiscation of the property of the plaintiffs in error, without due process of law, under the forms of judicial proceedings, and under the color merely of the law of the land, and, therefore, in violation of the Constitution of the United States.

As the rules laid down by the tribunals of last resort are, from the nature of the case, *law* until they are abrogated by the Legislature, or overruled judicially, so they enter into and form a part of the obligation of contracts made while they are still in force.

Therefore, if rights are taken away by the judgment of a judicial tribunal under a change of the decision and the rule which applied to and governed the transaction, under which the rights were acquired, at the time it was entered into, they are taken away without law, and without due process of law, in the sense of the Constitution of the United States.

SEVENTH.

The motion to dismiss the writ of error should be overruled.

J. HUBLEY ASHTON,
THOMAS D. COBBS,
Of Counsel for Plaintiff in Error,
C. C. GIBBS, *Trustee.*

APPENDIX.

CHAPTER LII.—An Act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That all the vacant and unappropriated land situated in the following-named counties, viz.: Noland, Mitchell, Howard, Martin, Andrews, Caines, Davidson, (Dawson?), Borden, Scurry, Fisher, Stonewall, Kent, Garza, Lynn, Terry, Yoakum, Cochran, Hockley, Lubbock, Crosby, Dickens, King, Cottle, Motley, Floyd, Hale, Lamb, Bailey, Parmer, Castro, Swisher, Briscoe, Hall, Childress, Collingsworth, Donley, Armstrong, Randall, Deaf Smith, Oldham, Potter, Cordova, Gray, Wheeler, Hemphill, Roberts, Hutchins, Moore, Hartley, Davidson, (Dawson?), Sherman, Hansford, Ochiltree, and Lipscomb be, and the same is, hereby appropriated and set apart for sale together with all the unappropriated lands situated and being within and included in the Pacific reservation, and together with such separate tracts of unappropriated public land, situated in organized counties of this State, as contain not more than six hundred and forty acres: *Provided*, That the three million and fifty thousand acres, heretofore appropriated for the building of a State Capitol, shall have a preference right of location in the counties heretofore reserved for that purpose. The provisions of this act shall not be so construed as to prohibit the right of pre-empting within the bounds of the reservation here made; but any party shall have the same right of acquiring a homestead, within this reservation, under the pre-emption laws of this State, as he may have had prior to the passage of this act.

SEC. 2. That any person, firm or corporation desiring to purchase any of the unappropriated lands herein set apart and reserved for sale may do so by causing the tract or tracts which such person, firm or corporation desire to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

SEC. 3. It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey, to certify to, record and map the field-notes of said survey; and he shall also, within the said sixty days, return to and file the same in the General Land Office, as required by law in other cases.

SEC. 4. Surveyors shall be entitled to receive from applicants for the purchase of such lands under the authority of this act all legal surveyor's fees for work done by them.

SEC. 5. Within sixty days after the return to and filing in the General Land Office of the surveyor's certificate, map and field-notes of the land desired to be purchased, it shall be the right of the person, firm or corporation who has had the same surveyed to pay or cause to be paid into the Treasury of the State the purchase-money therefor at the rate of fifty cents per acre, and upon the presentation to the Commissioner of the General Land Office of the receipt of the State Treasurer for such purchase-money, said commissioner shall issue to said person, firm or corporation a patent for the tract or tracts of land so surveyed and paid for.

SEC. 6. No tract of land shall be sold under the provisions of this act that contains more than six hundred and forty acres, and no tract shall have a greater frontage on any running stream, or permanent water, than one vara per acre for each survey of three hundred and twenty acres, or less, and three-fourths of one vara per acre for all other surveys.

SEC. 7. It shall be the duty of the Commissioner of the General Land Office to give such general and specific instructions to surveyors in relation to the surveying of the public lands, under the provisions of this act, as may best subserve the interest of the State and carry into force and effect the intent and purposes of this act.

SEC. 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void.

SEC. 9. Should any applicant for the purchase of public land fail, refuse, or neglect to pay for the same, at the

rate of fifty cents per acre within the time prescribed in section 5 of this act, he shall forfeit all rights thereto, and shall not thereafter be allowed to purchase the same, but the land so surveyed may be sold by the Commissioner of the General Land Office to any other person, firm, or corporation, who shall pay into the Treasury the purchase money therefor.

SEC. 10. One-half of the net proceeds of sales under the provisions of this act shall be, and are hereby, set apart for the benefit of the public free schools of this State, and the comptroller of public accounts shall, under and by direction of the Governor, invest the same in interest-bearing bonds of the United States, the interest therefrom to be paid into the Treasury as part of the available school fund. The balance of the net proceeds of sales under the provisions of this act shall be applied by the proper authorities to the payment and extinguishment of the bonded debt of the State of Texas as the same becomes due and payable. No surveys shall be made in any of the counties set aside for the State Capitol, and in which said lands may be selected, until after the surveys of the three million and fifty thousand acres set aside for the construction of a new State Capitol have been surveyed.

SEC. 11. Whereas the close of the present session of the Legislature is near at hand, an imperative public necessity exists that the constitutional rule requiring this bill to be read on three several days be suspended, and it is therefore so enacted; and, whereas, the unappropriated lands of the State are being rapidly taken up, a public emergency exists that this act take effect from and after its passage, it is therefore so enacted.

Approved July 14, A. D. 1879.

Takes effect ninety days after adjournment.

CHAPTER III.—An Act entitled an Act to withdraw the public lands of the State of Texas from sale.

SECTION 1. *Be it enacted by the Legislature of the State of Texas,* That all the public lands heretofore authorized to be sold, under the act entitled "An Act to provide for the sale of the unappropriated public land of the State of

Texas, and the investment of the proceeds of such sale," approved July 14, 1879, be, and the same is hereby, withdrawn from sale: *Provided*, That nothing contained in this act shall be construed to return the land reserved by an act entitled "An Act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, and the act amendatory of such act, approved March 11, 1881, to the mass of the public domain, but the same shall be construed to be reserved for the purposes for which said land was originally set apart and designated by said act, until the Legislature shall otherwise provide.

SEC. 2. Whereas these lands are being daily sold, to the great detriment of the State, an imperative public necessity exists for the immediate passage of this act, and that the constitutional rule requiring bills to be read on three several days should be suspended and this bill take effect from and after its passage, and it is so enacted.

Approved January 22, at one o'clock and thirty minutes, 1883.

Takes effect from and after its passage.

Office Supreme Court, U. S.
FILED.
JAN 12 1895
JAMES H. McKENNEY,
CLERK

No. 903.

In the Supreme Court of the United States.

E. M. BACON, E. G. GRAVES, and C. C. GIBBS, Trustee,
Plaintiffs in Error,

v.

THE STATE OF TEXAS.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

BRIEF FOR PLAINTIFFS IN ERROR BACON AND GRAVES, RESISTING MOTION TO DISMISS WRIT OF ERROR.

CHAS. W. OGDEN,
WM. M. WALTON,
JNO. W. MADDOX,
Attorneys for plaintiffs in error, Bacon and Graves.

TO FACILITATE EXAMINATION THESE REFERENCES ARE MADE.

Statement of the Case, pages 1–7:

First Statement, pages 1, 2: Proclamation convening Legislature in extra session, showing intent and purpose of the purchase act, and that the law was an immediate and pressing necessity of the State.

Second Statement, pages 3–5: Act under which the contract was made to purchase the land, and the act withdrawing the public land from sale, pages 4–5.

Third Statement, pages 5–6: How the purchase was made, how completed, and how ratified and confirmed by the State.

Fourth Statement, pages 6–7: How the land was surveyed, the contract made by the officials authorized and required by the State to do so.

Fifth Statement, page 7: The State recognized the survey as accurate by leasing and selling the land under it.

Sixth Statement, page 7: Under direction of the Land Commissioner 3,000,000 acres, and the whole of Greer county, was surveyed as this land was surveyed for plaintiffs.

Does this case present a Federal question? Pages 7–21.

Did the State contract to sell the land? Page 7, analysis of the act: Who was authorized to sell the land? Page 8. What should purchasers have done and what did they do? Pages 9, 10.

Four propositions on which plaintiffs rely, pages 10, 11:

1st proposition and authorities, 11, 12; remarks, rule uniformly acted on after Revised Statutes, 12. Rule recognized by Revised Statutes, 13. Rule expressly recognized in the purchase act, 13. Land Commissioner acted on the rule after Revised Statutes, page 13.

2nd proposition and authorities, pages 13–15.

3rd proposition and authorities, pages 15–17; remarks, 18–20.

4th proposition and authorities, page 20; remarks, 20, 21.

Some authorities relied on by the State considered. Wood v. Brady, page 28; Morley v. Railway, page 29.

What was the intent and purpose of the purchase act, and what would subserve the best interest of the State? Pages 29–31.

Briefly, what constituted this contract? Page 30.

Contract officially made, plaintiffs completed, and the State ratified and confirmed it, page 31.

To what court should the writ of error have been issued, pages 21–28.

Constitution of Texas as amended in 1891, page 21; Laws, as to Court of Civil Appeals, 21–23; as to the State Supreme Court, 23–24; Rules of Supreme Court, 24–25; discussion State judiciary system, 25–27; Re-

In the Supreme Court of the United States.

E. M. BACON, E. G. GRAVES, and C. C. GIBBS, Trustee,
Plaintiffs in Error,

v.

THE STATE OF TEXAS.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

BRIEF FOR PLAINTIFFS IN ERROR BACON AND GRAVES, RESISTING MOTION TO DISMISS WRIT OF ERROR.

STATEMENT OF THE CASE.

First Statement:

The Legislature of Texas was convened in extra session June 10, 1879, by proclamation of the Governor, in which he said:

"The matters submitted for your action in the proclamation convening the Legislature, are as follows:

"First—To make appropriations for the annual payment of the interest on the public bonded debt of the State and for a sinking fund for the ultimate discharge of said debt, if not otherwise paid.

"Second—To provide for the sale of the public lands, now amounting to 15,000,000 of acres, in order to pay off the public debt of the State, now amounting to about $5,500,000, and thereby save the necessity of imposing on the people, as soon as practicable, taxes to pay the interest on it, now amounting annually to near $400,000.

"Third—To make an appropriation of a specific amount for the annual support of the free common schools, out of the interest of the State and railroad bonds, now over $3,000,000 in amount, and so much more out of the general revenue as can be spared therefrom after providing for the prompt payment of the necessary expenses of an efficient and economical State government, and to repeal all laws and parts of laws that undertake to set apart or designate the amount of said annual appropriation for said purpose, in advance of or differently from the said specific appropriation now to be made, in order that hereafter each re-

curring Legislature may be left entirely free to determine the amount that can be safely appropriated specially for said purpose under the then existing financial conditions of the State.

"Fourth—To provide for the sale more expeditiously of the lands belonging to and set apart to the free school permanent fund, amounting now in surveyed and unsurveyed lands to about thirty-five millions of acres; and the investment of the proceeds thereof in order to raise a large fund in the shape of interest-bearing bonds, to enable this State, as soon as possible, 'to establish and make suitable provision for the support and maintenance of an efficient system of public free schools,' which is required by the Constitution, which has not yet been done or even approximated by the very large appropriation of one-fourth of the entire revenue raised by taxation annually, aided by the interest of $3,000,000 of State and railroad bonds belonging to its fund, and never can be by a direct State tax, without the aid of a large fund yielding interest, and it may be not then without the aid of voluntary local taxation as is done in other States."

(Message of Governor Oran M. Roberts to the Legislature of the State of Texas, extra session, convened in Austin June 10, 1879, pp. 4, 5.)

"The sale of the public lands, the University, Asylum, and Public Free School lands:

"In my inaugural and messages again submitted for your consideration, I endeavored to urge the propriety of immediately inaugurating the policy of expeditiously selling all of these lands. It will take fifty years to extinguish our public debt by the 2 per cent sinking fund, the lands will be gone long before that time, and the people will have to be taxed to pay the debt in the end and the interest of it in the meantime.

"The scholastic population is increasing faster than the public free school fund. That means increased taxation to preserve the present standard of schools. There are now about thirty-five millions of acres of school lands, which ought to increase the present school fund from three to fifteen or twenty million dollars. With such a fund drawing interest, we might hope indeed to build up and maintain an efficient system of public free schools with the aid of a light tax that would hardly be felt. Equally as good reasons may be given for the sale of all the other lands. I respectfully recommend one commissioner be appointed to sell all of these lands under the direction and sanction of a board of executive officers; that an appropriation be made to pay his salary and incidental expenses, and that each class of land shall be made to bear the expense of selling in proportion to the value of its land that may be sold. I have good reason to believe that with the facilities thus furnished, and upon extensive publications being made to let it be known, great quantities of land can be rapidly sold, and that it will be the best and fastest way to settle the country with a good population. I deem this a matter of great importance to the public interest in many respects, but especially as it looks to a more speedy closing up of the interest that the State has in lands, and will relieve the people from taxes in proportion to the lands sold." (Idem, p. 15.)

Second Statement.

At this extra session, the Legislature of Texas passed the following act:

CHAPTER LII.—An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That all the vacant and unappropriated land situated in the following named counties, viz., Nolan, Mitchell, Howard, Martin, Andrews, Gaines, Davidson, [Dawson?], Borden, Scurry, Fisher, Stonewall, Kent, Garza, Lynn, Terry, Yoakum, Cochran, Hockley, Lubbock, Crosby, Dickens, King, Cottle, Motley, Floyd, Hale, Lamb, Bailey, Parmer, Castro, Swisher, Briscoe, Hall, Childress, Collingsworth, Donley, Armstrong, Randall, Deaf Smith, Oldham, Potter, Cordova, Gray, Wheeler, Hemphill, Roberts, Hutchins, Moore, Hartley, Davidson [Dawson], Sherman, Hansford, Ochiltree and Lipscomb be and the same is hereby appropriated and set apart for sale, together with all the unappropriated lands situated and being within and included in the Pacific reservation, and together with such separate tracts of unappropriated public land, situated in organized counties in this State, as contain not more than six hundred and forty acres; *provided*, that the three millions and fifty thousand acres, heretofore appropriated for the building of a State capitol, shall have a preferred right of location in the counties heretofore reserved for that purpose. The provisions of this act shall not be so construed as to prohibit the right of pre-empting within the bounds of the reservation here made; but any party shall have the same right of acquiring a homestead, within this reservation, under the pre-emption laws of this State, as he may have had prior to the passage of this act.

SEC. 2. That any person, firm or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm or corporation desire to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

SEC. 3. It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey, to certify to, record and map the field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the General Land Office, as required by law in other cases.

SEC. 4. Surveyors shall be entitled to receive from applicants for the purchase of lands under the authority of this act, all legal surveyor's fees for work done by them.

SEC. 5. Within sixty days after the return to and filing in the General Land Office of the surveyor's certificate, map, and field notes of the land desired to be purchased, it shall be the right of the person, firm or corporation, who has had the same surveyed, to pay or cause to be paid into the Treasury of the State the purchase money therefor, at the rate of fifty cents per acre, and upon the presentation to the Commissioner of the General Land Office of the receipt of the State Treasurer for said purchase money, said Commissioner shall issue to said person, firm or corporation, a patent for the tract or tracts of land so surveyed and paid for.

SEC. 6. No tract of land shall be sold under the provisions of this act that contains more than six hundred and forty acres, and no tract shall have a greater frontage on any running stream, or permanent water, than one vara per acre for each survey of three hundred and twenty acres or less, and three-fourths of one vara per acre for all other surveys.

SEC. 7. It shall be the duty of the Commissioner of the General Land Office, to give such general and specific instructions to surveyors in relation to the surveying of the public lands, under the provisions of this act, as may best subserve the interest of the State, and carry into force and effect the intent and purposes of this act.

SEC. 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void.

SEC. 9. Should any applicant for the purchase of public land fail, refuse or neglect to pay for the same, at the rate of fifty cents per acre within the time prescribed in section 5 of this act, he shall forfeit all rights thereto, and shall not thereafter be allowed to purchase the same, but the land so surveyed may be sold by the Commissioner of the General Land Office to any other person, firm or corporation, who shall pay into the treasury the purchase money therefor.

SEC. 10. One-half of the net proceeds of sale under the provisions of this act, shall be and are hereby set apart for the benefit of the public free schools of this State, and the Comptroller of Public Accounts shall, under and by direction of the Governor, invest the same in interest-bearing bonds of the State of Texas, or if said bonds are not to be obtained, then in interest-bearing bonds of the United States, the interest therefrom to be paid into the treasury as part of the available school fund. The balance of the net proceeds of sale under the provisions of this act shall be applied by the proper authorities to the payment and extinguishment of the bonded debt of the State of Texas as the same becomes due and payable. No surveys shall be made in any of the counties set aside for the State capitol, and in which said lands may be selected, until after the survey of the three million and fifty thousand acres set aside for the construction of a new State capitol have been surveyed.

SEC. 11. Whereas, the close of the present session of the Legislature is near at hand, an imperative public necessity exists that the constitutional rule requiring this bill to be read on three several days be suspended, and it is therefore so enacted; and whereas, the unappropriated lands of the State are being rapidly taken up, a public emergency exists that this act take effect from and after its passage, it is therefore so enacted.

Approved July 14, A. D. 1879.

Takes effect ninety days after adjournment.

The act of July 14, 1879, was amended by an act approved March 11, 1881; but not in any way pertinent hereto.

The Legislature of Texas passed the following act, which was approved January 23, 1883, at 1:30 p. m.

CHAPTER III.—An act entitled an act to withdraw the public lands of the State of Texas from sale.

SECTION 1. Be it enacted by the Legislature of the State of Texas:

That all the public lands heretofore authorized to be sold, under the act entitled "An Act to provide for the sale of the unappropriated public land of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, be and the same is hereby withdrawn from sale: *Provided*, that nothing contained in this act shall be construed to return the land reserved by an act entitled "An Act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, and the act amendatory of such act, approved March 11, 1881, to the mass of the public domain, but the same shall be construed to be reserved for the purposes for which said land was originally set apart and designated by said act, until the Legislature shall otherwise provide.

SEC. 2. Whereas, these lands are being daily sold, to the great detriment of the State, an imperative public necessity exists for the immediate passage of this act, and that the constitutional rule requiring bills to be read on three several days should be suspended and this bill take effect from and after its passage, and it is so enacted.

Approved January 22, at one o'clock and thirty minutes, 1883.

Takes effect from and after its passage.

Third Statement.

December 1, 1882, Bacon and Graves applied to purchase the 298,240 acres of land involved in this suit; their application particularly designated the lands herein and other lands which they desired to purchase; and also designated the acts of 1879 and 1881, under which they applied to purchase. (See application, record, page 21.) December 1, 1882, this application was received, filed, and recorded by the surveyor of Palo Pinto land district, who was the proper officer to whom application to purchase this land should have been made. (See finding of the court 1 and 2, record, pages 10, 11.) Bacon and Graves were responsible parties. (See opinion of the court, record, pages 142, 143.) The surveyor undertook to survey the land designated, and directed his deputies, Berry and Williams, to do so. (See testimony of surveyor McKee, record, page 66.)

In December, 1882, and in January, 1883, Berry and Williams were deputy surveyors of Palo Pinto land district, under Joel McKee, who was the surveyor of that district. (See finding of the court 17, record, page 13.) On the 17th, 18th, 19th, 20th, 21st and 22nd of January, 1883, these deputy surveyors certified to the field notes of this land as having been surveyed by them according to law. (See findings of the court 4 to 10 inclusive, record, page 11.) These deputy surveyors were under oath and bond to faithfully perform their duties as such. (Revised Statutes of Texas, article 3840.) The certificate these deputy surveyors made of these field notes was prescribed by law (see subdivision 8, article 3908, Texas Revised Statutes), and were made strictly in accordance therewith. (See testimony of Land Commissioner McGaughey, record, page 63, and Exhibits B and C thereto, record, pages

64 and 65.) Joel McKee was the surveyor of Palo Pinto land district (see court's 17th finding, record, page 13); he was under oath and bond to faithfully perform his duties as such (see Revised Statutes of Texas, art. 3835), and he examined, approved, certified as correct, and recorded these field notes. (See findings of the court 4 to 10 inclusive, record, page 11; and 13, record, page 12; also McKee's testimony, record, page 67.) The certificate of correctness made by this district surveyor was prescribed by law (see subdivision 9, article 3908, Revised Statutes of Texas), and was made strictly in accordance therewith. (See McKee's certificates, record, pages 53 to 56, 91 to 99, and 119 to 124 inclusive). These field notes were returned and filed in the General Land Office, and the Land Commissioner received the filing fees for the benefit of the State, within the time required by law. (See findings of the court 3 to 10 inclusive, record, page 11.) The full purchase money for this land was tendered to the Treasurer within the time required by law. (See opinion of court, record, page 143.) The purchase money was paid January 3, 1891 (see finding of the court 24, record, page 14), and the money was received by the Treasurer, who acted under the advice of the Attorney-General (see Treasurer Lubbock's testimony, record, pages 62–63), and the purchase money was deposited in the Treasury, as provided by the act under which the payment was made, one-half to the credit of the public free schools of the State, to be invested in interest-bearing bonds of the State or United States; and the other half to payment of the bonded debt of the State. (See section 10, Act July 14, 1879, and Treasurer Lubbock's testimony, record, page 63.) The receipts for the purchase money were in the usual form—a separate receipt for each section, and acknowledged such payment to be in full for 640 acres of land, under the Act of July 14, 1879. (See Treasurer Wortham's testimony, record, page 59, and Exhibit A thereto, record, page 60.) The purchase money was never repaid nor tender thereof made to plaintiffs (see opinion of court, page 142), but was mingled with other money of the State and paid out in accordance with law on the Comptroller's warrants. (See Treasurer Wortham's testimony, record, page 59.)

Fourth Statement.

The deputy surveyors did not actually survey this land on the ground for Bacon and Graves, but they adopted the Elgin survey, which was an actual and accurate survey made on the ground. (See finding of the court 15, record, pages 12–13.) Prior to adopting the Elgin survey for Bacon and Graves, the deputy surveyors, Berry and Williams, had been upon the ground and by actual field work had ascertained that the survey was substantially accurate (see finding of the court 16, record, page, 13), and said Elgin survey, as far as marked lines and corners were concerned and

in accuracy of work, was equal to or better than any other surveying in that part of the State, except that done for the Texas and Pacific Railway, which was unusually accurate. (See last clause finding of court 16, record, page 13).

Fifth Statement.

The State of Texas recognized the Elgin survey as accurate, and leased and sold said lands under said survey as made by Elgin. ("The appellants hold possession as lessees of the * * * State to the even section," see Jumbo Company v. Bacon and Graves, 79 Texas, page 10.) John Moore and his brother bought one section from the State at one dollar per acre and ten sections at two dollars per acre, in 1884. (See his testimony, record, page 91.)

Sixth Statement.

Under direction of Land Commissioner Hall, Surveyor Strong in 1887 and 1888, adopted the United States survey of the whole of Greer county. (See Hall's testimony, record, 79–80); Corwin, under instructions from Land Commissioner Walsh, in 1883 and 1884 adopted the survey of 2,000,000 acres of land as previously surveyed under the acts of 1879–1881, and as surveyed for the Texas and Pacific Railway Company (see his testimony, record 82); and R. M. and T. A. Thompson, under instructions of Land Commissioner Walsh, adopted surveys which they had previously made of 1,000,000 acres of land. (See Walsh's testimony, record, 81–82.)

Does this case present a Federal question? If so, the writ of error will not be dismissed.

The question is, Did the State of Texas contract to sell this land to Bacon and Graves?

This question is determinative of the jurisdiction of this court; for if a contract existed, plaintiffs have vested rights under it, and the State violated the obligations of the contract when it sought to recover the land.

The purchase act of 1879 and 1881 authorized the contract to be made. Was it made—did the minds of the contracting parties meet?

On the part of the State, only three persons could have been concerned in making the contract. These were the officials of the State named in the act—the State Treasurer, the Commissioner of the General Land Office, and the surveyor (the district surveyor and his deputies).

These officers being the only ones named in the purchase act, it devolved upon some one or more of them to represent the State in contracting with plaintiffs.

So the question is, which of these officials represented the State in contracting to sell this land?

The only duty of the State Treasurer was as defined in section 5 of the act, where it is declared "* * * it shall be the right of the person, firm or corporation who has had the same surveyed, to pay or cause to be paid into the Treasury of the State the purchase money therefor at the rate of fifty cents per acre. * * *" And plaintiffs could not be deprived of their right by the refusal of the Treasurer to receive the purchase money; for in Jumbo Cattle Co. vs. Bacon & Graves, 79 Texas, 12, it is held "it is too plain for argument that the action of the Treasurer could not affect the rights of the parties."

The duties of the Land Commissioner were twofold, those purely ministerial, as provided in section 3 of the act, to receive and file the map and field notes in his office as provided by law in other cases; and as provided in section 5 of the act that "upon the presentation to the Commissioner of the General Land Office of the receipt of the State Treasurer for such purchase money, said Commissioner shall issue to said person, firm or corporation a patent for the tract or tracts of land so surveyed and paid for." These acts of the Land Commissioner in receiving and filing the map and field notes and in issuing the patents for the land, were purely ministerial, and in so doing he did not represent the State in making the contract, except in taking the filing fees for the benefit of the State; but he had other duties under the law which were discretionary, and in the doing of which he did represent the State in contracting for the sale of this land. Section 7 of the act declares that "it shall be the duty of the Commissioner of the General Land Office to give such general and specific instructions to surveyors in relation to the surveying of the public lands, under the provisions of this act, as may best subserve the interests of the State, and carry into force and effect the intent and purposes of this act."

Under this provision of the act, the Land Commissioner was not empowered to contract with purchasers for the sale of the land; but he was required to give instructions, general and specific, as to the manner in which the surveyor should survey the land. It was clearly his duty to give such instructions as he deemed would best subserve the interests of the State, and carry into force and effect the intent and purposes of the act. And the presumption is, that the Land Commissioner performed his official duty—that he gave the surveyors such general and specific instructions; and the presumption must be indulged, that the surveyor made this survey in accordance therewith; for under the purchase act specially, and the law in other cases, generally, it was the duty of surveyors to observe the instructions given them by the Commissioner.

Under section 9 of the act, the Land Commissioner alone was author-

ized to contract for the sale of lands surveyed under the act, which had been forfeited for non-payment of the purchase money. And he was authorized to do so on the sole condition that the purchaser should pay into the treasury the purchase money therefor.

Section 3 of the act declares that "it shall be the duty of the surveyor to whom application is made by responsible parties, to survey the land designated. * * " The surveyor determined that plaintiffs were responsible parties, and the Court of Civil Appeals has so held in this cause. So the surveyor, acting under such instructions, general and specific, as the Land Commissioner may have given him, was authorized to contract with plaintiffs for the purchase of this land.

But the State contends that it was the duty of plaintiffs to cause the land to be surveyed.

To this we do not accede in the sense the State contends; but we do concede that purchasers were bound to do and perform every duty and obligation which the law laid on them. And on this proposition the question arises:

What should plaintiffs have done; and what did they do?

They should have made application particularly describing the land they desired to purchase; they did so (see application, record, 2); they should have filed their application with the authorized surveyor of the district in which the land was situated; they did this (see finding of the court 1 and 2, record 10–11); they should have satisfied him that they were responsible parties; they did this (see opinion, record, 142–143); they should have satisfactorily paid him the fees to which he was entitled under law; this they did (as shown by the fact that the surveyor did the work); and they should have designated the act under which they desired to purchase, and this they did (see application, record, 21). And when this had been done, plaintiffs had done all they could do, and all the law contemplates they should do in causing the land to be surveyed. Then the third section of the act declares, "It shall be the duty of the surveyor * * * to survey the land designated * * *"; and this is to be done as contemplated in section 7 of the act, under such instructions, general and specific, as the Land Commissioner was required to give.

The State offered to sell this land to plaintiffs on the sole condition that they would cause the land to be surveyed. This they did, as contemplated by law. They particularly designated the land they desired to purchase; they filed this designation with the authorized surveyor of the district in which the land was situated; satisfied him that they were responsible parties; paid him his legal fees, and calling his attention to

the law under which they sought to purchase, they requested him to survey the land. Could they have done more; did the law contemplate that they should do more? Can the State be heard to say there is no contract, because its official agent, whose duty it was, and who had received his legal fees therefor, surveyed the land under such general and specific instructions as the Land Commissioner may have given him, and as the Supreme Court had from the very foundation of the government uniformly held was competent, legal, and valid?

Can the State say there was no contract, when these purchasers had thus done all they could do, and all the law contemplated they should do, in causing the land to be surveyed? And that, too, when the surveyor, in selling the land, was to the extent of his duties the agent of the State; and the law presumes that this officer did his duty within the scope of his jurisdiction and power; when this particular officer, under his official oath and bond that he would faithfully perform his duties, certified that he had done so? This certificate was required by law; and the field notes certified by his deputy were examined and certified as correct by the district surveyor, under his official oath and bond; and so certified, the field notes were received and filed by the Land Commissioner, who received the filing fees allowed by law for the benefit of the State. And following all this, the State received the purchase money for the land so surveyed, placed it in her Treasury, mingled it with her other funds, and appropriated it to her own uses, as provided in the act under which the land was sold; and has never repaid nor tendered payment thereof to plaintiffs. Does not this constitute a contract in law? Can the State repudiate the official acts of her authorized official agents, and thus impair such contract? If technicalities and irregularities there were in the survey, as claimed by proofs aliunde the face of the contract, certified officially under the oath and bond of the agent of the State authorized to make the contract, was not the receiving of the filing fees and the purchase money, and the appropriation and use thereof, a waiver of such technical irregularities, and an affirmation and confirmation of the regularity and legality of the survey?

In resisting the motion to dismiss the writ of error we rely upon the following propositions, which will be discussed separately:

I.

Under the statutory requirements as to surveying public lands, the Supreme Court of Texas, from the very foundation of the government, for more than fifty years, without an exception or even a dissenting opinion, uniformly held it competent, legal and valid to survey lands as this land was surveyed for plaintiffs; and all the departments of the State government had so held and so acted.

II.

The rule thus established, approved and tested by all the departments of the State, became a rule of property—to all intents and purposes as much the law as if enacted by the Legislature, so that without express legislative requirement, the Supreme Court of Texas could not change the rule in this case; and in attempting to do so, the court assumed legislative functions which it could not exercise; and impaired the obligations of plaintiffs' contract.

III.

There is no statute which requires or authorizes the courts of Texas to change the rule in this case; for Article 3908 of the Revised Statutes of Texas is but and only the continuing in force of the law as it existed theretofore.

IV.

If article 3908 be not the law, and only the law as it theretofore existed, then it has no application to the surveys in controversy, because the purchase act of 1879 expressly provides in its seventh section for the survey of lands sold thereunder; and these provisions were passed in contemplation of the then existing law, and of its uniform construction by all the departments of the State of Texas, and not in view of article 3908, which was not then the law, and which did not become the law until September first thereafter. And further, because the act of July 14, 1879, was passed by the Sixteenth Legislature, and the proviso to section 20 of the Final Title of the Revised Statutes expressly declares, "that any law passed by the Sixteenth Legislature in conflict with any provision of this act (the Revised Statutes) shall be the law of the State, this act (the Revised Statutes) to the contrary notwithstanding."

Proposition 1.

Under the statutory requirement as to surveying public lands, the Supreme Court of Texas, from the very foundation of the government, for more than fifty years, without an exception or even a dissenting opinion, uniformly held it competent, legal, and valid to survey land as this land was surveyed for the plaintiffs; and all the departments of the State government have so held and so acted.

Authorities.

Horton v. Pace, 9 Texas, 84.
Jenkins v. Chambers, 9 Texas, 231.
Styles v. Gray, 10 Texas, 504.

Chadoin v. McGhee, 20 Texas, 481
Jones v. Burkett, 46 Texas, 293.
Lapsley v. Spencer, 20 Howard, 272.
Doswell v. De La Lonza, 20 Howard, 33, and authorities there cited.
Duren v. Railway, 86 Texas, 291.

The Duren case, supra, was decided in 1883, and the opinion is as follows:

"It seems that the survey and field notes were made by an agent of the locators, and were approved and adopted by the lawful surveyor. This is certainly a practice not to be commended, and one which it would seem the Legislature did not contemplate. Therefore, if the question were an open one, we might have difficulty in reaching the conclusion that a survey made by a locator for his own benefit could be adopted by the surveyor so as to give it any validity. But it was held in Howard v. Perry, supra, that this could be done. It is true that in that case the locator was himself the deputy surveyor; but the court seem to attach no importance to that fact. In the opinion they say: 'But it is objected to the defendant's survey that it was made by and for himself. It is, however, approved by the district surveyor, and thereby became in contemplation of law, his act.' And we apprehend that the deputy had no authority to make a survey for himself, and that validity of the survey depended wholly upon the approval of the district surveyor. Such is our construction of the opinion, and it is decisive of the point before us. Whatever our own views may be upon the question as an original one, it has been too long recognized as a rule of property in every department of the State Government to be now overturned."

Remarks.

This rule was uniformly acted on by public surveyors, even after the adoption of the Revised Statutes.

Bonnell says (record, page 73), that "when a surveyor had partially run and identified the lines of a prior survey, and found the survey correct, he would not go again upon the ground in surveying lands under the acts of 1879 and 1881, but would have copied the original field notes of record in the surveyor's office. The custom and practice of surveyors under such circumstances was to adopt all former work that had been found correct." Gano says (record, 72), "the Land Office was perfectly familiar with the custom of surveyors in locating lands." Munson says (record, 77), "I know of several cases where lands had been previously surveyed, and field notes recorded, where surveyors, who were familiar with the survey, adopted them without going a second time on the ground;" and page 78, he says, "the custom of surveying lands under

the acts of 1879 and 1881 was the same as that adopted in surveying other large blocks."

The rule was recognized by the Revised Statutes.

Article 3900, Revised Statutes, provides that where field notes of a survey have not been returned to the Land Office within the time prescribed by law, the owner of the certificate * * * "shall have the right to relocate the same certificate or other evidence of legal right to land upon the same survey, but without being compelled to have the same resurveyed." * * *

The rule was expressly recognized by the purchase act of 1879.

Section 9 of the act provides that where a survey has been made under that act and the lands become forfeited for nonpayment of the purchase money * * * "the land so surveyed may be sold by the Commissioner of the General Land Office to any other person, firm or corporation who shall pay into the Treasury the purchase money therefor."

Land Commissioners Walsh and Hall acted on the rule after the adoption of the Revised Statutes.

In 1883 Commissioner Walsh instructed Corwin to select lands previously surveyed, and adopt and return the field notes of 2,000,000 acres (see Corwin testimony, record, page 82, and Walsh's testimony, record, page 80), and Walsh authorized R. M. and T. A. Thomson to adopt their own prior surveys of 1,000,000 acres (see Walsh's testimony, record, pages 80–81), and in 1887 and 1888 Commissioner Hall authorized Strong to adopt the United States survey of the whole of Greer county. (See Hall's testimony, record, pages 79–80.)

Second Proposition.

The rule thus established, approved, and tested by all the departments of the State, became a rule of property—to all intents and purposes as much the law as if enacted by the Legislature; so that without express legislative requirement, the Supreme Court could not change the rule in this case; and in attempting to do so, the court assumed legislative functions which it could not exercise, and impaired the obligations of plaintiffs' contract.

Authorities:

In Thomson v. The Railway, 68 Texas, 397, it was said, that to do so "* * * would be fraught with consequences so grave that nothing short of a statute clearly requiring such a construction would justify it. It has been held, that a surveyor might adopt a survey formerly made" (citing decisions so holding). In Craig v. Redford, 4 L. C. P. Co., page 468 (3 Wheaton, U. S.), it is held, "An act directing the duty of surveyors of lands * * * is merely directory to the officer, and it does

not make the validity of the survey to depend upon the conformity of the officer to its requisitions. * * * The Legislature may undoubtedly declare all such surveys to be void; but no statute to this effect was in force in Virginia at the time when this survey was made." The statute is directory and not mandatory. (Forbes v. Withers, 71 Texas, 306.) The statute is to be liberally construed with a view to effect its object and promote justice. (Sec. 3, Final Title, Texas Revised Statutes, p. 671.)

In Laffingwell v. Warren, 2 Black, 603, it was held, that "the construction given to a statute of the State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

In Ohio Life Insurance and Trust Company v. Debolt, 16 Howard, 416, the court say: "The sound and true rule is that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered by its courts of justice, its validity and obligation can not be impaired by any subsequent act of the legislature of the State, or decision of its courts altering the construction of the law."

See also Pequa Bank v. Knopp, 16 Howard, 393.

And in Anderson v. Santa Anna, 116 U. S., 351, the Supreme Court of the United States again says: "If, according to the law of Illinois, as declared by its highest court, at the time the bonds in suit were issued, the act of February 28, 1867, was a valid exercise of legislative power, the rights of the purchasers or holders could not be affected merely by subsequent change of decision. For it is the long established doctrine of this court—from which, as said recently in Green County v. Commr., 109 U. S., 105, we are not disposed to swerve—that where the liability of a municipal corporation upon negotiable securities depends upon a local statute, the rights of the parties are to be determined according to the law as declared by State courts at the time such securities were issued."

In Douglass v. County of Pike, 101 U. S., 677, the Chief Justice said: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of legislative enactment."

See also County of Ralls v. Douglass, 105 U. S., 727–732; Olcott v. Supervisors, 16 Wall., 678; City v. Lawson, 9 Wall., 477, 485; Boyd v. Alabama, 94 U. S., 645; Taylor v. Ypsilante, 105 U. S., 60, 71; Thompson v. Lee County, 3 Wall., 327, 330; Brown v. Mayor, 63 N. Y., 239, 244; Cooley's Const. Lim., 474, 477, fourth ed.; Dillon's Mun. Corp., sec. 46.

It is said by the Supreme Court of the United States, in Douglass v.

Pike County, Book 25, Lawyers ed., 100 U. S., 971: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts, and existing contract rights, that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effects on contracts as an amendment of the law by means of legislative enactment."

To the same effect is the case of Louisiana v. Pilsbury, 105 U. S., 295.

Proposition 3.

There is no statute which required or authorized the court to change the rule in this case; for article 3908 of the Revised Statutes of Texas is but and only the continuing in force of the law as it existed theretofore.

Authorities.

Subdivision 8 of article 3908 Revised Statutes of Texas.

"The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same; and also that such survey was actually made in the field, and that the field notes have been duly recorded, giving book and page."

The law as it existed theretofore:

§ 19. "The surveyors shall make oath before the respective Commissioners, truly and faithfully to discharge the duties of their office."

§ 20. "The course of the lines shall be determined by the magnetic needle, and care shall be taken to determine its variations from the pole in the district where the surveys are made."

§ 21. "The surveys shall be made with great caution, with metallic chains made for the purpose, and care shall be taken that the place of beginning the survey of each parcel of land be established with certainty, taking the bearing and distance of two permanent objects at least." (Sayles' Early Laws, vol. 1, p. 100.

2nd. Stafford v. King, 30 Texas, 269; Sanborn v. Gunter, 84 Texas, 284; and other Texas cases, hold that it has always been contemplated and prescribed by the laws of Texas that the lines of surveys should be actually run and measured on the ground; and the Court of Civil Appeals so holds in this case, citing above authorities. (See opinion, p. 140.)

3rd. The report of the commission of codifiers relating to the Revised Civil Statutes of Texas, contains the following explanatory state-

ments, which are of the utmost importance in arriving at the legislative intention in enacting article 3908, in so far as it contemplates and requires an actual survey on the ground.

Under Title 79, Public Lands, the commission say:

"The object being to collect under one general head, all the laws now in force relating to the disposition and sale of the public domain, and which provide the mode and manner of acquiring titles to land from the State, as distinguished from lands belonging to individuals, it seems more appropriate that the title should be 'The Public Lands.'

"The commission have left out all land laws which are now inoperative and which do not furnish a rule of action for the future, and also such as in their judgment ought to be repealed or superseded; and after revising and digesting the laws in force, have arranged the different subjects into twelve chapters, and, as near as may be, in their natural order.

"The material changes are very few, and the more important are here noted as follows:

"1. The different land certificates, which for the most part form the foundation of Texas land titles, are defined and classified, referring in the margin to the laws under which they were issued. It furnishes in a condensed form the necessary information, and serves to explain what are the different land certificates which are required to be located within five years after April, 1876, and for which duplicates may issue in certain cases.

"2. It regulates the mode and manner of making entries and locations, and provides that no survey shall hereafter be made until after entry, etc. This will protect the *bona fide* locator against locations and surveys made in the field of which he could have no notice. It also provides for entries where part of the land lies in another land district.

"3. A pre-emption is a preference right to buy. A donation on condition of three years' residence, etc., is not a pre-emption. Chapter 8 provides for pre-emptions, and furnishes the mode by which a settler may enter 160 acres of land, and may have twelve months' time in which to pay for it, etc. We have followed in some respects the provisions of the United States Statutes relating to the same subject, and also relating to homestead donations treated of in another chapter.

"4. We have also furnished more definite rules by which the settler may make entry upon the public domain, and after three years' residence obtain title to a homestead donation.

"5. The provisions of chapter 2, page 582, relating to land reservations seems to be all that is necessary to retain on that subject.

"The work of the Commission under this title was submitted to the Commissioner of the General Land Office for his examination and criticism, and we acknowledge our indebtedness to him for suggestions as to some of the amendments adopted." (See Sayles' Texas Civil Statutes, volume 2, pages 732–733.)

And under Final Title, General Provisions, page 739, volume 2, Sayles' Civil Statutes, the Commission says: "Section 19 provides that the Revised Statutes, where substantially the same as the laws now in force, shall not be construed as repealing the latter or as new enactments thereof, but merely as a continuance of them."

And in closing the report, pages 940–941, volume 2, Sayles' Civil Stat-

utes, the Commission says: * * * "We are under special obligations * * * to the late Commissioner Groos, as well as his successor, Mr. Walsh. * * * Without their aid it would have been almost impossible to have prepared in so short a time the titles 'Archives,' 'County Boundaries,' 'Public Lands,' 'University, School, and Asylum Lands.'

"Such as it is, we now submit the work to you to be laid before the Legislature, whose duty it will be to examine and pass upon it. It will be their duty, because, under the Constitution, they will become responsible for it and become its authors if it goes into force.

"Still, while the Constitution and laws make them responsible for the work, and require them to pass upon it, it must be borne in mind, that in the nature of things, the time to be devoted by them to that examination must necessarily be short, and the examination itself, however carefully conducted, unavoidably very imperfect.

"The entire time of a session of the usual length would not suffice for the purpose. And when it is remembered that a great portion of the session must necessarily be consumed in carefully preparing the different and necessary appropriation bills, and in providing the ways and means for supplying deficiencies, and supplying funds necessary to meet the actual expenses of the Government for the next ensuing two years, it will at once be seen that the examination of these bills can not possibly be as complete as it ought to be.

"Recognizing this to be the fact, we have endeavored to adhere, as nearly as possible, to the old law, so as to render less arduous the labor of examination. No great or radical changes, therefore, have been made, and no startling or strange innovations in our system have been introduced."

4th. Section 23 of the final title of the Revised Statutes of Texas, page 720, is also an authority in point, and shows that the Legislature adopted the Revised Civil Statutes as reported by the codifiers without careful deliberation, and that the intention of the commission became the intention of the Legislature.

"Section 23. Because this bill can not be read in one day, or on three several days, an imperative public necessity exists requiring that the constitutional rule that the same be read on three several days should be suspended, and it is therefore suspended."

5th. Section 19 of the Revised Statutes of Texas, page 719, declares:

"That the provisions of the Revised Statutes, so far as they are substantially the same as the statutes of this State in force at the time when the Revised Statutes shall go into effect, or of the common law in force in this State at said time, shall be construed as continuations thereof, and not as new enactments of the same."

6th. Section 3 of the Final Title of the Revised Statutes of Texas, page 718 declares:

"Sec. 3. That the rule of the common law that statutes in derogation thereof shall be strictly construed, shall have no application to the Revised Statutes, but the said Statutes shall constitute the law of this State respecting the subjects to which they relate, and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice."

Remarks:

Article 3908, Revised Statutes, contains nine subdivisions, as follows:

"The field notes of every survey shall state:"

"1. The county or land district in which the land is situated."

"2. The certificate or other authority under or by virtue of which it is made, giving a true description of same by numbers, date, where and when issued, name of original grantee and quantity."

"3. The land, by proper field notes, with the necessary calls and connections for identification (observing the Spanish measurement by varas)."

"4. A diagram of the survey; and,"

"5. The variation at which the running was made."

"6. It shall show the names of the chain carriers."

"7. It shall be dated and signed by the surveyor."

"8. The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same; and also that such survey was actually made in the field, and that the field notes have been duly recorded, giving book and page."

"9. When the survey has been made by a deputy, the county or district surveyor shall certify officially that he has examined the field notes, has found them correct, and that they are duly recorded, giving book and page of record."

The object of this whole article is to secure a definite survey of land, under official authority by virtue of a legal right, and to perpetuate the act; and when this has been accomplished the law is satisfied, and confirms the right acquired. No matter whether this has been done under article 3908—the law as it existed theretofore, under the special provisions of the purchase act of 1879, or under the provisions of any other act.

The object and purpose of subdivision 2 of article 3908, is for identification of the certificate or other right by virtue of which the survey is made, and without which it could not be known by what authority the survey is made, or whether by any legal authority; and when the description is sufficiently full to identify the claim or right to land with certainty, the object of the subdivision is attained, though all of the directory requirements may not have been inserted for such identification. For instance, a description of the certificate by its number, quantity, and name of original grantee, would with certainty and definiteness identify the certificate, and such description would, to all intents and purposes, be a compliance with the spirit of the provision of law, notwithstanding the date of the certificate, when issued, and where issued, should be omitted.

Subdivision 3 of article 3908, is the *life and substance* of the entire article, and its object and purpose is to identify the land surveyed. *The land must be described by proper field notes, and the field notes must contain the necessary calls and connections for identification;* and when

this is done in such way as to segregate the proper quantity of land, and give a description thereof by which it can subsequently be identified, the life of the article is preserved, the spirit of the law is obeyed, the object thereof is attained, and the right thereunder is vested; no matter whether the actual work on the ground to obtain such description has been done by the surveyor who certifies the field notes, or by some other official surveyor whose work he had inspected and found to be correct, as in the case at bar. For after all, as said by Chief Justice Stayton in Thomson v. The Railway (68 Texas, 397), a legal survey is a description of land for its identification, rather than the actual work done by the surveyor to enable him to give such a description.

The object and purpose of subdivision 8 of article 3908 is to evidence officially and affirmatively the correctness of the survey, that it was made according to law, and that the survey was actually made in the field. Under former laws, the surveyor was required to certify the correctness of the survey. It has always been contemplated and required that the survey should be made according to law, and it was, and is, the universal custom of surveyors to so certify. It is not a disputed question that all laws in force prior to the Revised Statutes contemplated and required an actual survey on the ground. All prior decisions of the Supreme Court so hold, and it is so held in the opinion of the Court of Civil Appeals in this cause. The certificate of the surveyor required by this subdivision of article 3908, is merely a statement of fact—an evidence of what has been done—and if it be conceded that this provision for an official certificate, for evidence of what has been done, expressly contemplates and specifically requires an actual survey on the ground, still it must be admitted that it is merely and only the requirement of the law in force prior thereto, and is a continuance thereof, and not a new enactment with reference to actual surveys in the field. So, conceding that the official certificate here required contemplates an actual survey in the field, it does no more than an unbroken line of decisions by the Supreme Court holds was contemplated and required by all laws in force prior thereto. There is not even a dissenting opinion holding to the contrary.

The surveyors who made the surveys in controversy certified the correctness of the surveys, and that they were actually made in the field according to law, and this certificate is true in every essential particular. The surveys are substantially accurate and definite, they were actually made in the field, and they were well made. About this there is and can be no question, for there is no finding of the court which questions the substantial accuracy of said surveys; but on the contrary, the court finds the surveys to be substantially correct, and also that they were actually made in the field by Elgin, and that Berry and Williams had, by their own work in the field, ascertained that the survey was so made, and the

finding of the court is that it is one of the best surveyed blocks in that part of the State; and we submit that under such survey and contract the official record thereof, certified under the official oath and bond of the surveyors, who were the agents of the State, authorized and required to survey the land, authorized and required to make the contract, that a contract exists which the State of Texas can not, under the Constitution and laws of the United States, impair.

Proposition 4.

If article 3908 be not the law and only the law as it existed theretofore, then it has no application to the surveys in controversy; because the purchase act of 1879 expressly provides, in its seventh section, for the survey of lands sold thereunder; and these provisions were passed in contemplation of the then existing law, and of its uniform construction by all the departments of the State of Texas, and not in view of article 3908, which was not then the law, and which did not become the law until September first thereafter; and further, because the act of July 14, 1879, was passed by the Sixteenth Legislature, and the proviso to section 20 of the Final Title of the Revised Statutes expressly declares "that any law passed by the Sixteenth Legislature in conflict with any provision of this act [the Revised Statutes], shall be the law of this State, this act [the Revised Statutes] to the contrary notwithstanding."

Authorities.

Those heretofore cited under propositions 1, 2, and 3, supra.

Certificate of the Secretary of State appended to the laws of the extra session of the Sixteenth Legislature of Texas, p. 53.

Proviso to section 20, Final Title of the Revised Statutes of Texas, pp. 720, 721.

Section 22 of the Final Title of the Revised Statutes of Texas, p. 720 (which declares that the Revised Statutes shall take effect September 1, 1879, at 12 o'clock meridian).

Section 11 of the act of July 14, 1879 (emergency clause).

Remarks.

The purchase act, approved July 14, 1879, was passed by the extra session of the Sixteenth Legislature, and article 3908 of the Revised Statutes did not take effect until September 1st thereafter. The purchase act contains the emergency clause, and had that act been passed as contemplated by a two-thirds vote, it would have gone into immediate effect upon its approval, July 14, 1879, long before September 1st, when article 3908 became operative; in which case that article could have had no application to surveys made under the purchase act, because article

3908 was not then the law. Therefore we submit that the surveys in controversy, as made for Bacon and Graves, were legal and valid surveys in contemplation of the law under which they purchased.

Is the Court of Civil Appeals the court to which writ of error should have issued?

Statement of the Constitution and laws of Texas bearing on the subject:

Section 1. The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, District Courts, and in such other courts as may be provided by law. * * *

Sec. 2. The Supreme Court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and the concurrence of two judges shall be necessary to the decision of a case. * * *

Sec. 3. The Supreme Court shall have appellate jurisdiction only, except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction, under such restrictions and regulations as the Legislature may prescribe. * * *

Sec. 6. The Legislature shall * * * divide the State into not less than two nor more than three Supreme Judicial Districts, and thereafter into such additional districts as the increase of population and business may require, and shall establish a Court of Civil Appeals in each of said districts, which shall consist of a chief justice and two associate justices, who shall have the qualifications as herein prescribed for justices of the Supreme Court. Said Court of Civil Appeals shall have appellate jurisdiction coextensive with the limits of their respective districts, which shall extend to all civil cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law; provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error. * * * Until the organization of the Courts of Civil Appeals, * * * as herein provided for, the jurisdiction, power, and organization and location of the Supreme Court, * * * shall continue as they were before the adoption of this amendment. All civil cases which may be pending in the Court of Appeals shall, as soon as practicable after the organization of the Courts of Civil Appeals, be certified to, and the records thereof transmitted to the proper Courts of Civil Appeals, to be decided by said courts. * * *

Sec. 7. The State shall be divided into as many judicial districts as may now or hereafter be provided by law. * * * For each district there shall be elected * * * a judge. * * * He shall hold the regular terms of his court at the county seat of each county in his district at least twice in each year, in such manner as may be prescribed by law. * * * (Constitution of Texas, as amended in 1891.)

Sec. 5. The appellate jurisdiction of the Courts of Civil Appeals shall extend to civil cases within the limits of their respective districts:

(1) Of which the district court has original or appellate jurisdiction. * * *

Sec. 10. There shall be appointed for each of the Courts of Civil Ap-

peals one clerk, * * * which appointment shall be made by the court or the judges thereof, * * * and [who] shall enter into a bond * * * conditioned for the faithful performance of the duties of his office, and that he will correctly record the judgments, decrees, decisions, and orders of said courts. * * *

Sec. 14. The clerks of said court shall file and carefully preserve the transcripts of all records certified to said court, and all papers relative thereto, and shall docket all causes in the order in which they are filed.

Sec. 15. The said clerk shall faithfully record the proceedings and decisions of said court, and certify their judgments to the court from which the causes were brought.

Sec. 24. In all cases of appeal or writ of error to the Court of Civil Appeals, the trial shall be on a statement of facts or agreed statement of the pleadings and proof, as agreed upon by the parties or their attorneys, or the conclusions of law and fact as the case may be, certified to by the judge of the court below; or should the parties fail to agree, then the judge of the court below shall certify the facts; or on a bill of exceptions to the opinion of the judge; or on a special verdict; or on an error in law, either assigned or apparent on the face of the record; and in the absence of all these, the case shall be dismissed with costs alone, or with costs and damages, at the discretion of the court. And the court shall admit as part of the record to be examined by them in the trial of a cause every bill of exception not signed by the judge trying the cause below, upon its appearing to the satisfaction of the court that the facts are fairly stated therein; that said bill was prepared in accordance with the law governing the preparation of such bills, and that the judge trying the cause refused to sign the same; and the truth of any such bill of exceptions shall be determined by the court on the copies of the affidavits required by law to be made in such cases, such copies to be contained in and to form a part of the record transmitted to the Court of Civil Appeals.

Sec. 25. The appellant or plaintiff in error shall, in all cases, file with the clerk of the court below all assignments of error distinctly specifying the grounds on which he relies before he takes the transcript of the record from the clerk's office; all errors not distinctly specified are waived.

Sec. 31. After a cause is decided in the Court of Civil Appeals, a conclusion of the facts and law of the case shall be filed in said cause within thirty days after the decision of the same; *provided*, it shall not be necessary to file said conclusion in causes in which no writ of error will lie to the Supreme Court; but where a cause is reversed, then the court shall file the reasons for reversing the same.

Sec. 34. After the question is decided the Supreme Court shall immediately notify the Court of Civil Appeals of their decision, and the same shall be entered as the judgment of said Court of Civil Appeals.

Sec. 41. Any party desiring a rehearing of any matter determined by said courts may, within fifteen days after the date of entry of the judgment or decision of the court, or the filing of the findings of fact and conclusions of law, file with the clerk of said court his motion in writing for rehearing thereof, in which motion the grounds relied upon for the rehearing shall be distinctly specified and the name and residence of the counsel of the opposing party, if known, and if not known, then the name and residence of the opposing party as shown in the record;

provided, that should the court adjourn within less than fifteen days after the rendition of the judgment, the motion may be made as [at] such time and in such manner as may be prescribed by rules to be made by the Supreme Court.

Sec. 42. Upon the filing of such motion with the clerk of said court, he shall make a certified copy thereof and transmit the same by mail to the sheriff or any constable of the county in which the attorney or opposing party, as the case may be, is alleged in said motion to reside, together with a precept commanding him to deliver the copy of the motion to the person named in such precept.

Sec. 44. At any time after five days from the return of such precept served, it shall be lawful for said court to hear and determine such motion for rehearing, and not sooner. (Chapter 15, laws 1892, called session, p. 25, et seq.)

Article 1011. That the Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, which shall extend to questions of law arising in all civil cases of which the Courts of Civil Appeals have appellate but not final jurisdiction.

Article 1011a. All causes shall be carried up to the Supreme Court by writs of error issuing from the Supreme Court to the Courts of Civil Appeals upon final judgment and not on judgments reversing and remanding causes except in the following cases, to-wit: * * *

Article 1011b. Any party desiring to sue out a writ of error before the Supreme Court, shall present his petttion to said court stating the names and residences of the parties adversely interested, with a brief statement of the nature of his case and the ground upon which the writ of error is prayed, and it must appear that the errors complained of arose upon questions of law, the determination of which were necessary to the decision of the cause in the Court of Civil Appeals, and that said questions was [were] properly presented to said court, and it must further appear that the Supreme Court would have jurisdiction thereof; and the petition shall contain such other requisites as may be prescribed by the Supreme Court. The petition must be accompanied with a certified copy of the conclusions of law and fact filed in the cause by the Court of Civil Appeals, with the opinion thereof, together with a certified copy of the judgment in the trial court and of the bond given in the lower court, if any, and if plaintiff in error has given no bond, then the Supreme Court in granting the writ shall specify what bond shall be given, and the plaintiff in error shall file said bond in the trial court to be approved by the clerk of said court, and a certified copy thereof shall be at once transmitted to the Supreme Court, and upon the filing of said certified copy, the clerk of the Supreme Court shall issue citation in error as may be prescribed by the rules of the Supreme Court.

Article 1011c. If it shall appear to the Supreme Court from an inspection of the petition and record that there is error in said judgment of the Court of Civil Appeals, it shall grant a writ of error returnable in thirty days, in such manner as may be prescribed by said court.

Article 1011d. The Supreme Court shall from time to time make and promulgate suitable forms, rules and regulations for carrying into effect the foregoing articles relating to the jurisdiction and practice of the Supreme Court.

Article 1017. There shall be appointed for the Supreme Court one

clerk, * * * which appointment shall be made by the court or the judges thereof, and shall be entered of record in the proceedings of the court, * * * and [who] shall enter into a bond * * * conditioned for the faithful performance of the duties of his office, and that he correctly records the judgments, decrees, decisions, and orders of the said court. * * *

Article 1033. In all cases of writs of error or certificates of error to the Supreme Court, the trial shall be only upon the question of law upon which the writ of error was allowed, or which was certified to the Supreme Court from a Court of Civil Appeals; but the Supreme Court may require at any time the original transcript to be sent up.

Article 1039. When any cause or suit may be taken to the Supreme Court by writ of error, the briefs and arguments filed in the Court of Civil Appeals shall be submitted to the Supreme Court. * * *

Article 1043. There shall be no reversal or dismissal for want of form; provided, that the requirements of law and the rules of the court be sufficiently complied with in presenting the case to enable the court to determine the same upon its merits. In each case the Supreme Court shall affirm the judgment, reverse and render the judgment which the Court of Civil Appeals ought to have rendered, or reverse the judgment and remand the case to the lower court, if it shall appear that the justice of the case demands another trial. (Chapter 14, Laws 1892, called session, pp. 19, et seq.)

Rules for the Supreme Court.

1. Applications for writs of error from this court to the several Courts of Civil Appeals shall consist of a petition addressed to the court and accompanying transcript certified under the hand and seal of office of the clerk of the Court of Civil Appeals. The petition, in addition to the requisites prescribed in the statute, shall show that the applicant has made a motion for a rehearing in the Court of Civil Appeals, presenting distinctly all the points upon which a writ of error is asked, and that the motion has been overruled. The transcript, in addition to the conclusions of fact and law and opinion of the Court of Civil Appeals and of the judgment rendered and bond given in the trial court as required by the statute, shall also contain a copy of the judgment of the Court of Civil Appeals, together with a copy of the motion for a rehearing filed therein, and of the order overruling the same. The application shall be deposited with the clerk of this court.

2. The clerk of this court shall receive all applications for writs of error, and file the petition and accompanying transcript from the Court of Civil Appeals, and enter the case upon a docket kept for that purpose, known as the application docket. The cases shall be numbered consecutively on the application docket, and the number shall be placed upon the application. Upon filing the application the clerk shall immediately issue a notice under his hand and seal of office to the clerk of the court from which the writ of error is sought, that the application has been filed. After the receipt of such notice the clerk of the latter court shall withhold the mandate until advised of the disposition of the case, in this court, by the proper process.

3. The application, when filed in accordance with law, shall be deemed

submitted to the court and ready for disposition, unless the applicant shall file with his petition a request for time in which to present a brief or written argument, in which case a period of time not exceeding ten days may be allowed him for that purpose. The applicant, should he so elect, may cite his authorities in his petition or may file a separate brief or argument.

4. Upon a refusal by this court of an application for a writ of error, the clerk of this court shall transmit, with the least practicable delay, to the clerk of the Court of Civil Appeals, to which the writ of error was sought to be sued out, a certified copy of the order of this court denying such application.

5. If the application be granted, the clerk shall issue a writ of error to the judges of the court, the judgment of which is sought to be revised, advising them that the writ of error has been granted and directing them to cause to be transmitted forthwith to this court the original transcript of the proceedings of the trial court, together with all briefs and arguments on file in the case; and the clerk shall also issue a citation to the defendant or defendants in error, or to his or their attorneys of record, notifying him or them that the writ of error has been granted, and of the date thereof, and to appear and defend the same. Said citation shall be returnable in ten days, and in the event it be not served the clerk shall issue other successive citations until due service is had. Service of the citation upon one attorney will be deemed service upon all parties represented by him. If no bond be required, the citation and writ of error shall issue immediately upon the granting of the application. If a bond be required the writ shall issue upon receipt of the duly certified copy of the bond prescribed by the statute. Unless further time be allowed by special order of the court in the particular case, the certified copy must be filed in this court within ten days from the granting of the application. If the copy be not so filed, the application will be dismissed by the court of its own motion.

6. When service of the citation in error shall have been had, and the original transcripts and briefs sent up to this court by the Court of Civil Appeals, it shall be the duty of the clerk to put the case upon the trial docket, and to mark upon the file the number of the case as shown upon such docket. Cases upon the trial docket shall be numbered consecutively in the order in which they are entered thereon.

8. A case shall stand for submission upon the first regular day for the submission of causes, coming after the expiration of thirty days from the day on which the writ of error shall have issued, provided the citation in error shall have been served ten days before such submission day. If not so served, then the case shall be subject to submission on the first regular submission day, which falls ten days after the service of the citation. (Rules of Supreme Court, 84 Texas, 695–7.)

The first proposition on which defendant in error founds his motion to dismiss this case for want of jurisdiction in the court, is as follows:

"It is sought to reverse a judgment of the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas, which is not the highest court of said State in which a decision on the matter in controversy could be had." See motion to dismiss, and also brief of defendant in error, page 1.

The judiciary system of Texas, while it may not be peculiar, yet needs explanation, to the end that the court may readily see the want of merit in the above ground to dismiss.

We have a trial court, a Court of Civil Appeals, and a Supreme Court. A review of a judgment of the trial court is unrestricted, save as to amounts. Appeal is matter of right, on compliance with statutory conditions.

To have the judgment of the Court of Civil Appeals reviewed by the Supreme Court is not matter of right; but in the discretion of the whole bench of the Supreme Court only may a petition for writ of error be granted.

When an appeal is taken from the trial court to the Court of Civil Appeals, a complete and perfect transcript is made of the trial court records and filed in the Court of Civil Appeals. On this record the judgment and proceedings of the trial court are reviewed; if found correct, the judgment is affirmed; if incorrect, the judgment is reversed and remanded or reversed and reformed.

If either party be dissatisfied with the judgment of the Court of Civil Appeals, he has right to file a motion for rehearing, questioning the soundness of the decision. This motion being overruled, the case is then in condition to be made the basis for an application for writ of error from the Supreme Court to the Court of Civil Appeals.

No application for a writ of error will be entertained wherein a motion for rehearing has not been made in the Court of Civil Appeals and overruled by that court.

The party who makes application for writ of error is required to present to the Supreme Court duly certified copies of the following papers, the originals of which, by law, are lodged in the Court of Civil Appeals until the writ of error is allowed, viz.:

1. Motion for rehearing.
2. Opinion of the court deciding the case, with its conclusions of fact and law.
3. Judgment of the court entered in accordance with such opinion.
4. Opinion and judgment of the court on motion for rehearing.
5. The appeal bond taken in the trial court.
6. The assignments of error as made in the trial court.

On the inspection of these papers, the Supreme Court either allows or disallows the writs of error applied for. If disallowed, the record of the case remains in and becomes a permanent record or archive of the Court of Civil Appeals. If allowed, the whole transcript as originally made in and sent up from the trial court, together with all briefs and arguments filed in the Court of Civil Appeals, subsequent to the lodgment of the

transcript therein, are transferred to the Supreme Court preparatory to a review of the judgment and proceedings of the Court of Civil Appeals.

Constitution of Texas as amended in 1891, art. 5, secs. 1, 2, 3, 6, 7, *supra*.

Texas Laws 1892—establishing Courts of Civil Appeals, pp. 25, et seq. Secs. 5, 10, 14, 15, 24, 25, 31, 34, 41, 42, 44, *supra*.

Laws of 1892, in regard to Supreme Court, pp. 19 et seq., arts. 1011, 1011a, 1011b, 1011c, 1011d, 1017, 1033, *supra*.

Rules 1, 2, 3, 4, 5, 6, and 8 of the Supreme Court, made and adopted under article 1011d supra, 84 Texas, pp. 695–697.

Remarks.

It will be readily observed that until the writ of error had been granted the Supreme Court has no record, and under the law can have in its possession no record of the case which could be furnished to the Supreme Court of the United States should writs of error be issued to it for that purpose. It will be further observed that the Court of Civil Appeals is the custodian of the record, until the law orders a removal thereof, after a writ of error has been granted. After the writ has been granted an order of information and direction goes out from the Supreme Court to the Court of Civil Appeals, informing them that the writ of error has been granted, and directing them to forthwith transmit to that court the original transcript of the proceedings of the trial court, together with all briefs and arguments in the case. Rule 5, *supra*.

Each court has their own clerk, who is custodian of the records, archives, books, and papers. Art. 1017 *supra*, and sec. 10 also *supra*.

If the writ had in this case been issued to the Supreme Court, it would have been wholly ineffective, because there was no record there to be sent up, and a second writ would have been necessary to reach and bring it forth for the inspection of this court.

We have been clear in our view that this case came under the class of cases represented by Greogory v. McVeigh, 23 Wallace, 305, 306; Windsor v. McVeigh, 93 U. S., 275; Fisher v. Perkins, 122 U. S., 526; nor have we had cause to change our opinion. These books were before us when the application for writ of error was drawn.

We could not go to the Supreme Court of Texas, because the law did not and does not give us the writ of error as matter of right, and because the only court that had the power to grant us that right refused us the privilege. The writ of error is directed to the highest court in Texas in which a decision in the suit could be had, unless and provided permission had been granted to come up to that other and yet higher tribunal.

Mr. Foster, in his Federal Practice, second ed., p. 1003, vol. 2, says:

"The writ should be directed to the court in which the final judgment was rendered, by whose process it is to be executed, and where the record remains, although a higher court has considered the case upon appeal or writ of error, and sent down a remittitur or rescript accordingly." Citing Fisher v. Perkins, *supra.*

And further: "In the latter case the writ may be directed to the higher court, and sent through its instrumentality, to obtain the record from the inferior court having it in keeping; but it is the safer practice to address the writ to the court that has the record." Citing Atherton v. Fowler, 91 U. S., 143–147.

WOOD V. BRADY, 150 U. S., CONSIDERED.

In that case, the court held that the discretion of the board of supervisors to extend the time for the performance of the contract, was no part of defendant's contract, that he had no legal right to such extension, and that there was no possible contract the obligation of which could be impaired by a ruling that the board of supervisors had no power to grant such extension, and on that ground the writ of error was properly dismissed.

In that case the single decision of Taylor v. Palmer was relied upon as establishing the rule, while in this case plaintiffs relied upon a rule of property established by a line of decisions extending from the very foundation of the government, which had uniformly, without a single exception, or even a dissenting opinion, declared what constituted a legal and valid survey of land, and all the departments of the State of Texas had recognized and observed the rule.

Plaintiffs do not contend that the Supreme Court of Texas is bound by its former decisions to that extent that it may not correct the errors of former decisions; but they do contend that in this instance there is no error; that this line of decisions extending from the foundation of the government, attested by all decisions through a half century of time, approved and observed by all the departments of the State, established a rule of property which became, to all intents and purposes, a part of the statute itself, which declares what shall constitute a legal and valid survey of land; and that the courts are powerless to annul the statute as it had so long existed; that in the language of Chief Justice Stayton in Thompson v. Railway, 68 Texas, 397, "to so hold would be fraught with consequences so grave that nothing short of a statute clearly requiring such construction would justify it;" and as held by Chief Justice Gaines in Duren v. Railway, 86 Texas: "It has been too long recognized as a rule of property in every department of the State government to be now overturned." That without express legislative enactment clearly requiring a change of construction, the courts are bound to respect it as they must

statutory provisions, and that when the courts of Texas in this case sought to change and ignore this rule of property, they assumed legislative functions, which impaired the obligation of plaintiffs' contract to purchase the lands in controversy.

In Morley v. Railway Company, 146 United States, the court held, page 171, that they were not authorized to review the judgment of the State court, on the ground that the judgment of that court refused to give effect to a valid contract, nor because that judgment in effect impaired the obligations of a contract. The Supreme Court based this decision on the ground that Morley had not been deprived of his property, but that he had received his judgment and 6 per cent interest, which was all he was entitled to receive. The judgment of the State court was held not to be reviewable as to the rate of interest, on the ground that in such a case "interest is in the nature of damages, and does not arise out of any contract between the parties;" citing Ogden v. Saunders, 12 Wheat., 213–343.

The Supreme Court did not hold, as the Attorney General for the State of Texas would seem to conclude, that in no case would they be authorized to review the judgment of a State court where such court refuses to give effect to a valid contract, or in effect impairs the obligations of a contract.

What was the intent and purpose of the Act of July 14th, 1879? And what was necessary to subserve the best interests of the State?

That the act was an immediate and pressing necessity of government is manifest from the Governor's proclamation convening the Legislature in extra session. (See first statement herein.) The object and purposes of the act as gathered therefrom was to secure money by selling public lands to pay the bonded debt of $5,500,000, the annual interest thereon of $400,000, and for the maintenance of the public schools of the State, and thereby relieve the people from the burdens of taxation. The Governor says: "I have good reason to believe that upon extensive publications being made to let it be known, great quantities of land can be rapidly sold, and that it will be the best and fastest way to settle the country with a good population. I deem this a matter of great importance to the public interest in many respects, but especially as it looks to a more speedy closing up of the interest that the State has in lands, and will relieve the people from taxes in proportion to the lands sold."

The intent and purposes of the act, as gathered from the law itself, seems to have been that indicated in the Governor's proclamation and message. The main object was to raise money, one-half to be devoted to the payment of the public debt and the other half to the maintenance

of the public schools. That this was the primary and leading intent is indicated by the short period within which the money should be paid into the treasury after application. That the raising of money quickly was the main intent and purpose is indicated by the fact that there was no limit as to acreage of land which any purchaser might buy, and still further by the fact that corporations and firms, as well as individuals, were authorized to purchase land to the full extent of their desire and ability.

We submit that, such being the intent and purpose of the act, the best interests of the State demanded that a liberal construction should be given to the act and all laws upon the subject.

Authorities:

Governor's proclamation, convening Legislature in extra session (first statement of case, supra).

Act of July 14, 1879 (second statement, supra).

Sec. 3, Final Title, Revised Statutes of Texas.

White v. Martin, 66 Texas, 342.

What constitutes the contract in this case?

1. Plaintiffs particularly designated the land they desired to purchase; they filed this designation with the surveyor authorized to make the survey—authorized to sell the land; they satisfied him that they were responsible parties; they paid him his fees for surveying the land, and they designated the act under which they desired to purchase, and requested him to survey the land for them in accordance therewith.

2. The surveyor approved the applicants as responsible parties; he received, filed, and recorded their application to purchase, and directed his deputies to survey the land; the deputies surveyed the land as all the departments of the State had held was competent, legal, and valid; they returned the field notes to the district surveyor, made out and certified to officially in every respect as contemplated by article 3908—the law theretofore, of which it was a continuation.

The land was actually surveyed on the ground by Elgin, and the deputies who certified to the field notes by their own work in the field knew it to be an accurate and definite survey, and the court found that it was one of the best surveyed blocks of land in that part of the State.

3. The district surveyor examined, approved, certified as correct and recorded the field notes, and thereby the actual survey of Elgin, verified on the ground as correct and certified as correct by Berry and Williams, and which was an actual survey on the ground, and an accurate and definite survey, became the work of the district surveyor, and, as held in Duren v. Railway, validity was thus given to the survey.

The contract thus made was completed by plaintiffs, and was approved and confirmed by the State of Texas.

1. The Land Commissioner, who was required by the act to instruct the surveyors generally and specifically as to surveying this land, received and filed the field notes in his office, and took the filing fees for the benefit of the State; and thus he approved the surveys as made and returned; and while the dates of the surveys showed conclusively how they were made, the Commissioner raised no objection thereto on any account.

2. The Treasurer took the purchase money under direction of the Attorney-General of the State; and under the same advice, executed his receipt therefor in the usual form, acknowledging the same to be in full payment for this land, under the act; thus the Treasurer and Attorney-General of Texas approved and confirmed the contract.

3. The then Attorney-General Hogg, who advised the Treasurer to take the money and to issue the receipts in full payment for the land, within a few days thereafter became the Governor of the State, and under section 10 of the act he directed the Comptroller of Public Accounts to invest said purchase money in interest-bearing bonds of the State or of the United States (see sec. 10, act 1879), and the money was so invested under the Governor's direction, for Treasurer Wortham says (Record, p. 59) the money was mingled with other funds of the State and paid out on the warrants of the Comptroller in accordance with law; and thus the Governor of Texas, the Comptroller of Texas, and a second Treasurer of Texas approved and confirmed the contract for the sale of this land.

And notwithstanding the contract was so made under official authority, completed by plaintiffs, and approved and confirmed by the Land Commissioner, by the Attorney-General, by the Comptroller, by two Treasurers, and by the Governor of Texas, still the State of Texas says there was no contract; and, under the laws and the authority of said State, held by its courts to be valid, plaintiffs' contract has been impaired, the land has been recovered, and the purchase money retained.

We respectfully submit to this court, that the motion of the Attorney-General to dismiss the writ of error should be refused.

CHAS. W. OGDEN,
WM. M. WALTON,
JNO. W. MADDOX,
Attorneys for plaintiffs in error, Bacon and Graves.

FILED.
MAY 6 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE LAW ASSOCIATION
OF
PHILADELPHIA.

No. 296.

E. M. BACON, E. C. GRAVES, AND C. C. GIBBS, TRUSTEE,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

BRIEF FOR C. C. GIBBS, TRUSTEE, PLAINTIFF IN ERROR.

J. HUBLEY ASHTON,
THOMAS D. COBBS,
Counsel for Plaintiff in Error, C. C. Gibbs, Trustee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

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THE STATE OF TEXAS.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

BRIEF FOR C. C. GIBBS, TRUSTEE, PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the court of civil appeals for the second supreme judicial district of the State of Texas, rendered December 6, 1892, affirming a final judgment of the district court of Mitchell county, Texas, rendered December 22, 1891, in an action brought by the State of Texas against the plaintiffs in error, E. M. Bacon, E. C. Graves, and C. C. Gibbs, for the recovery of 550 sections of

land, each section containing 640 acres, situated in Scurry and Borden counties, Texas.

The action was originally brought in Scurry county, Texas, but on motion of the defendants the venue of the cause was changed to Mitchell county, in that State.

The action was trespass to try title to the lands in question, and the defendants answered by general demurrer, a plea of not guilty, general and special answer, and disclaimer to some of the lands sued for.

Judgment was rendered by the district court of Mitchell county against the defendants for all the lands sued for by the State of Texes, and the defendants appealed to the supreme court of the State of Texas.

The case was subsequently transferred, by a change in the constitution and laws of the State, to the court of civil appeals for the second district, at Fort Worth, which affirmed the judgment of the district court of Mitchell county, and the defendants thereupon appealed to the supreme court of Texas for a writ of error, which was denied and refused by that court, and the judgment of the court of civil appeals was thereby left in full force. (Rec., p. 162.)

The judgment of the court of civil appeals is therefore the final judgment of the highest court of the State "in which a decision in the suit could be had."

THE ACTS OF 1879 AND 1883.

On July 14, 1879, the legislature of the State of Texas passed an act entitled "*An act to provide for the sale of a portion of a portion of the unappropriated public lands of the State and the investment of the proceeds of such sale.*"

The act provided as follows:

SECTION 1. *Be it enacted by the legislature of the State of Texas,* That all the vacant and unappropriated land situated in the following-named counties, viz: Nolan, Mitchell, Howard, Martin, Andrews, Caines, Davidson, (Dawson?),

Borden, Scurry, Fisher, Stonewall, Kent, Garza, Lynn, Terry, Yoakum, Cochran, Hockley, Lubbock, Crosby, Dickens, King, Cottle, Motley, Floyd, Hale, Lamb, Bailey, Parmer, Castro, Swisher, Briscoe, Hall, Childress, Collingsworth, Donley, Armstrong, Randall, Deaf Smith, Oldham, Potter, Cordova, Gray, Wheeler, Hemphill, Roberts, Hutchins, Moore, Hartley, Davidson, (Dawson?), Sherman, Hansford, Ochiltree, and Lipscomb be, and the same is hereby, appropriated and set apart for sale together with all the unappropriated lands situated and being within and included in the Pacific reservation, and together with such separate tracts of unappropriated public land, situated in organized counties of this State, as contain not more than six hundred and forty acres: *Provided*, That the three million and fifty thousand acres, heretofore appropriated for the building of a State capitol, shall have a preference right of location in the counties heretofore reserved for that purpose. The provisions of this act shall not be so construed as to prohibit the right of pre-empting within the bounds of the reservation here made; but any party shall have the same right of acquiring a homestead, within this reservation, under the pre-emption laws of this State, as he may have had prior to the passage of this act.

SEC. 2. That any person, firm or corporation desiring to purchase any of the unappropriated lands herein set apart and reserved for sale may do so by causing the tract or tracts which such person, firm or corporation desire to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

SEC. 3. It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey, to certify to, record and map the field-notes of said survey; and he shall also, within the said sixty days, return to and file the same in the General Land Office, as required by law in other cases.

SEC. 4. Surveyors shall be entitled to receive from applicants for the purchase of such lands under the authority of this act all legal surveyor's fees for work done by them.

SEC. 5. Within sixty days after the return to and filing in the General Land Office of the surveyor's certificate, map

and field-notes of the land desired to be purchased, it shall be the right of the person, firm or corporation who has had the same surveyed to pay or cause to be paid into the treasury of the State the purchase-money therefor at the rate of fifty cents per acre, and upon the presentation to the Commissioner of the General Land Office of the receipt of the State treasurer for such purchase-money, said Commissioner shall issue to said person, firm or corporation a patent for the tract or tracts of land so surveyed and paid for.

SEC. 6. No tract of land shall be sold under the provisions of this act that contains more than six hundred and forty acres, and no tract shall have a greater frontage on any running stream, or permanent water, than one vara per acre for each survey of three hundred and twenty acres, or less, and three-fourths of one vara per acre for all other surveys.

SEC. 7. It shall be the duty of the Commissioner of the General Land Office to give such general and specific instructions to surveyors in relation to the surveying of the public lands, under the provisions of this act, as may best subserve the interest of the State and carry into force and effect the intent and purposes of this act.

SEC. 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void.

SEC. 9. Should any applicant for the purchase of public land fail, refuse, or neglect to pay for the same, at the rate of fifty cents per acre within the time prescribed in section 5 of this act, he shall forfeit all rights thereto, and shall not thereafter be allowed to purchase the same, but the land so surveyed may be sold by the Commissioner of the General Land Office to any other person, firm, or corporation who shall pay into the Treasury the purchase-money therefor.

SEC. 10. One-half of the net proceeds of sales under the provisions of this act shall be, and are hereby, set apart for the benefit of the public free schools of this State, and the comptroller of public accounts shall, under and by direction of the governor, invest the same in interest-bearing bonds of the United States, the interest therefrom to be paid into the treasury as part of the available school fund. The balance of the net proceeds of sales under the provisions of this act shall be applied by the proper authorities to the payment and extinguishment of the bonded

debt of the State of Texas as the same becomes due and payable. No surveys shall be made in any of the counties set aside for the State capitol, and in which said lands may be selected, until after the surveys of the three million and fifty thousand acres set aside for the construction of a new State capitol have been surveyed.

SEC. 11. Whereas the close of the present session of the legislature is near at hand, an imperative public necessity exists that the constitutional rule requiring this bill to be read on three several days be suspended, and it is therefore so enacted; and, whereas, the unappropriated lands of the State are being rapidly taken up, a public emergency exists that this act take effect from and after its passage, it is therefore so enacted.

Approved July 14, A. D. 1879.

Takes effect ninety days after adjournment.

This act was amended by an act approved March 11, 1881, which did not affect the provisions of the act of 1879 in their application to the present case.

The legislature of Texas subsequently passed an act as follows:

CHAPTER III.—AN ACT entitled An act to withdraw the public lands of the State of Texas from sale.

SECTION 1. *Be it enacted by the legislature of the State of Texas*, That all the public lands heretofore authorized to be sold, under the act entitled "An act to provide for the sale of the unappropriated public land of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, be, and the same is hereby, withdrawn from sale: *Provided*, That nothing contained in this act shall be construed to return the land reserved by an act entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, and the act amendatory of such act, approved March 11, 1881, to the mass of the public domain, out the same shall be construed to be reserved for the purposes for which said land was originally set apart and designated by said act, until the legislature shall otherwise provide.

SEC. 2. Whereas these lands are being daily sold, to the

great detriment of the State, an imperative public necessity exists for the immediate passage of this act, and that the constitutional rule requiring bills to be read on three several days should be suspended and this bill take effect from and after its passage, and it is so enacted.

Approved January 22, at one o'clock and thirty minutes, 1883.

Takes effect from and after its passage.

THE GENERAL FACTS.

On December 1, 1882, Messrs. Bacon and Graves, under the provisions of the acts of 1879 and 1891, made an application in writing to Joe McKee, the surveyor of the Palo Pinto land district, to purchase the 298,240 acres of land involved in this suit, their application particularly designating the lands herein involved and other lands which they desired to purchase under those acts.

The application was as follows:

"PALO PINTO, TEXAS, *December* 1, 1882.

"*To the Surveyor of Palo Pinto District.*

"SIR: By virtue of an act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and investment of the proceeds of such sale, approved July 14, 1879, and an act to amend sections 1 and 6, approved March 11, 1881, we, Elbert M. Bacon and Everett G. Graves, hereby make application for and file on the following lands, in Borden and Scurry counties, to wit: Beginning at the northeast corner of survey No. 170, block No. 25, H. & T. C. R. R. Co., thence west 13 miles; thence north 10 miles and 1,727 varas to the northeast corner of survey No. 1, block No. 29, township 5 N., T. & P. R. R. Co.; thence north 77 degrees east with the north line of the Texas and Pacific 80-miles reservation 28 miles; thence east 7 miles; thence south 3 miles to the southwest corner of survey No. 59, block K, T. A. Thomson; thence east 5 miles to the southeast corner of survey No. 55, block K; thence south 2,700 varas to the northeast corner of survey No. 247, block 2, H. & T. C. R. R. Co.; thence south 75 degrees west 2 miles to the northeast corner of survey No. 251; thence

north 15 degrees west 1 mile to the northeast corner of survey No. 276; thence south 75 degrees west 9 miles to the northwest corner of survey No. 268; thence south 15 degrees east 4½ miles with the west line of block 2; thence south 2 miles; thence west 6 miles; thence south 21 miles; thence west 9 miles to the east line of the Lavaca Navigation Co. surveys; thence north 14 miles to the place of beginning, containing about 550 sections.

"ELBERT M. BACON.
"EVERETT G. GRAVES."

(Rec., p. 21.)

On December 1, 1882, this application was received, filed, and recorded by the surveyor of Palo Pinto land district, who was the proper officer to whom application to purchase this land should be made. (Findings of the court 1 and 2, Rec., pp. 10, 11.)

Bacon and Graves were responsible parties. (Opinion of the court, Rec., pp. 142, 143.)

The surveyor undertook to survey the land designated in the application and authorized the deputy surveyors under him, E. A. Williams and H. M. Berry, to do the work. (Rec., pp. 66, 67.)

The surveyor and his deputies were under oath, and bound to faithfully perform their duties as such. (Rev. Stats. Texas, articles 3835, 3840.)

On the 17th, 18th, 19th, 20th, 21st, and 22d of January, 1883, the deputy surveyors certified to the field-notes of this land as having been surveyed by them according to law. (Findings of the Court, 4 to 10, inclusive, Record, p. 11.)

The certificate of these deputy surveyors on the field-notes was prescribed by law and made in accordance therewith. (Subdivision 8, Art. 3908, Rev. Stats. Texas, Rec., pp. 63, 64, 65.)

The surveyor of Palo Pinto land district certified to the correctness of the field-notes in the manner prescribed by law. (Subdivision 9, Art. 3908, Rev. Stats. Texas, Rec., pp. 53–56, 91–99, 119–124.)

These field-notes were recorded in the surveyor's office and returned to and filed in the general land office of the State, and the Commissioner received the fees for filing the same within the time required by law. (Findings of the court, 3–10, Rec., p. 11.)

The full purchase-money for this land was tendered to the State treasurer within the time required by law. (Opinion of the court of civil appeals, Rec., p. 143, fols. 189, 190.)

The first tender, made in 1883, was refused, but not because it was claimed that the surveys had not been actually made on the ground. (Rec., pp. 60–62.)

On January 3, 1891, the plaintiffs in error paid to the State treasurer *$149,120* in respect to the purchase-money of the land involved in this suit, as follows:

Two hundred and ninety-one sections of 640 acres each, being the surveys numbered from 1 to 291, both inclusive, in block "G," Borden and Scurry counties; also 58 sections of 640 acres each, being surveys numbered from 1 to 58, both inclusive, in block "M," in Borden and Scurry counties; also 117 sections of 640 acres each, being surveys numbered from 1 to 117, both inclusive, in block "B," in Scurry county. (Record, p. 59.)

The treasurer of the State in receiving the money for these lands acted under the advice of the then attorney general, and the purchase-money was deposited in the treasury, as provided by the act of July 14, 1879. (Sec. 10, act July 14, 1879; Treasurer Lubbock, Rec., p. 63.)

Attorney General Hogg, who advised the treasurer to take the money, and to issue the receipts in full payment for the land, within a few days thereafter became the governor of the State, and under section 10 of the act he directed the comptroller of public accounts to invest the purchase-money in interest-bearing bonds of the State or of the United States (see sec. 10, act 1879), and the money was so invested under the governor's direction, for Treasurer Wortham says (Record, p. 59) the money was

mingled with other funds of the State and paid out on the warrants of the comptroller, in accordance with law; and thus the governor of Texas, the comptroller of Texas, two treasurers of Texas, and the land commissioner of Texas approved and confirmed the contract for the sale of this land, as it had been officially made and completed.

The receipts given for the purchase-money were in the usual form of a separate receipt for each section of land, and acknowledged such payment to be in full for 640 acres of land under the act of July 14, 1879. (Wortham, Rec., pp. 58, 59, 60.)

Payment was made only in respect to land surveyed upon the application to purchase prior to the repeal of the act of 1879. Interest in other lands was disclaimed.

The deputy surveyors did not actually survey the land on the ground, but the surveyor and the deputy surveyors, in making out the field-notes of the land applied to be purchased and surveyed by Bacon and Graves, adopted the field-notes of blocks 97 and 27, in what is known as the *Elgin survey*, in July, 1883, of a body of lands in Scurry, Borden, and adjoining counties, for the Houston and Texas Central Railway Company, by virtue of certificates issued to that company by the commissioner of the general land office of the State of Texas. (Findings of the court, Rec., p. 12.)

Blocks 97 and 27 of the Elgin survey were actually surveyed on the ground by J. E. Elgin, the surveyor, in the manner in which it had been customary for surveyors in Texas to survey large bodies of land, and the blocks were divided, in writing up the field-notes, into 640-acre surveys. The field-notes of the blocks have remained in the general land office since they were filed therein, and the lands are platted on the maps of that office.

There are 33,280 acres in block 27 and 611,000 acres in block 97. Deputy Surveyors Berry and Williams, who made the surveys for Bacon and Graves, had, prior to the adoption of the field-notes for them, run lines and ascer-

tained corners in blocks 27 and 97, and found them to be as correct as any work of that character in that part of the State, and they were satisfied as to the substantial accuracy of the surveys. The surveys, as far as marked lines and corners were concerned and in accuracy of work, were equal to or better than any other surveying in that part of the State, except that done for the Texas and Pacific railway, which was unusually accurate. (Record, pp. 12, 13.)

Berry and Williams both testified that they had been upon the ground, and had done a great deal of surveying within the limits of block 97 for parties, and that they were familiar with that block and knew it to be correctly surveyed (Rec., p. 68). They copied in some instances the surveys of the Houston and Texas Central Railway Company where they knew them to be correct, and they had also before them their field books and the data obtained by them on the ground in the field, to which they referred for verification (Rec., pp. 67, 69, 70). They were familiar with the surveys of block 97, and they had no difficulty in writing correct field-notes.

These field-notes properly ascertained and correctly identified the land and segregated it from the public domain.

The court of civil appeals found and decided that the original tender of the money in the first instance was sufficient and in time, and that the treasurer could not defeat the right of the parties to purchase by refusing to receive their money. (Rec., p. 143, fol. 190, where the court cites the decision in *Jumbo Cattle Co. vs. Bacon and Graves*, 79 Texas, 12.)

THE PLEADINGS.

The petition of the State of Texas in this action, filed November 27, 1871, alleged that on July 15, 1889, the State was the owner in fee-simple and in the possession of certain tracts and parcels of land in Scurry, Borden, and other

counties, containing about 550 sections; that afterwards the defendants unlawfully entered upon and dispossessed the plaintiff of the said land and withheld from it the possession thereof, and that the rents and damages for the use and occupation of the land amounted to $25,000 per annum. (Rec., pp. 1, 2.)

On December 14, 1891, defendants filed their answer, which consisted of a general demurrer, special exceptions, and special *answer*, the latter asserting an equitable title in the defendants to 298,240 acres of land under their application, survey, tender of the purchase-money in 1883, and payment of the purchase-money in 1891, as above stated.

After reciting the purchase by *application, survey, tender, and payment*, the defendants stated as follows:

"That the said plaintiff to be permitted to deprive these defendants of the lands so purchased by them as aforesaid, and in which they have a vested right, will be in violation of the Constitution of the United States, impair and destroy the obligation of the contract, and perpetrate an irreparable wrong and injury upon defendants.

"That the defendants having in all respects fully complied with the provisions of the law in respect to the purchase of said lands, under which said lands were offered for sale by the plaintiff, their rights thereto became and were vested, and the act of the legislature subsequent thereto [namely, the act of January 22, 1883], repealing said law, was, under article 2, section 10, subdivision 1, of the Constitution of the United States, null and void as affecting defendants' vested right." (Rec., pp. 6, 7.)

The question was thus directly presented by the facts alleged in the pleadings as to whether or not there was a contract between the parties for the purchase of the lands involved in this suit, and claimed by the defendants, under the act of July 17, 1879, the obligation of which was impaired by the subsequent act of January 22, 1883, repealing the act of July 17, 1879, in violation of the Constitution of the United States.

The State replied to this answer by supplemental petition, alleging as follows:

"The defendants were not entitled or authorized to purchase the said lands, and did not comply with the law in reference thereto in any particular, and did not in fact purchase the same from plaintiff through any officer authorized to bind or conclude the plaintiff, and *the said lands were not at the times named by defendants on the market for sale.*

"The plaintiff says that if said defendants did in fact tender the treasurer the sum of money named in 1883, as alleged, the treasurer properly refused and declined to receive the same, for the defendants had not purchased the same from plaintiff, by complying with *any existing law authorizing the purchase and sale thereof.*" (Rec., pp. 8, 9.)

The State thus claimed exemption from defendants' rights *through and by virtue of the repealing act of January* 22, 1883, above set forth.

On the trial of the case the district court of Mitchell county made certain findings of fact, upon which judgment was rendered for the State of Texas that it recover from the defendants the lands in controversy. (Rec., p. 15.)

Among these findings of fact were the following:

1. On December 1, 1882, E. M. Bacon and E. G. Graves made application to Joel McKee, who was then the surveyor of the Palo Pinto land district, as such surveyor, to purchase the land in controversy under what is known as the fifty-cent act, approved July 14, 1879, and amended March 11, 1881; which said application was received and recorded by said surveyor on said day.

2. The land so applied for was situated at the time of application in the Palo Pinto land district, and the said surveyor was the proper officer to whom application for the purchase of the same should have been made.

3. Bacon and Graves paid the fees for filing the field-notes in the general land office entirely within the time required by law.

13. The surveyor of Palo Pinto land district certified to

the respective surveys hereinafter mentioned on the days said surveys purport to have been made.

14. None of the land included in this suit has ever been patented by the State under the Bacon and Graves purchase, and on the 26th day of May, 1890, Bacon and Graves transferred by deed of special warranty 579 sections of land to C. C. Gibbs, who holds the same as trustee for E. M. Bacon and E. G. Graves and others.

15. I further find as a matter of fact that none of the land in suit was actually surveyed upon the ground by the deputy surveyor, who purported to have done so, but they merely copied in the office of the surveyor of the Palo Pinto land district the field-notes of the "Elgin survey."

In July, 1873, the Houston and Texas Central Railway Company located certificates in Scurry, Borden, Howard, Kent, and Fisher counties on lands known as blocks 27 and 97 of the Houston and Texas Central Railway Company survey, including that sued for herein, which said block 97 comprises surveys from 1 to 955, all of which were by virtue of land certificates issued to said company by the commissioner of the general land office of the State of Texas, and the field-notes thereof bear date "July, 1873," and were returned in the surveyor's office during the month of ——, 1873, and were filed in the general land office November 20 and 26, 1873, and all the lands in this suit were and are within the Texas and Pacific railway eighty-mile reservation marked by the act of legislature passed May 2, 1873.

The above survey is the "Elgin survey," the field-notes of which were adopted by the surveyor of the Palo Pinto land district and his deputies in making out the field-notes of the land applied to be purchased by Bacon and Graves.

Blocks 97 and 27 were actually surveyed on the ground by Elgin in the manner in which it has been customary by surveyors in Texas to survey large bodies of land—that is, by running the outside boundary lines of the blocks, or a part of them, putting up permanent landmarks, and leaving the interior lines without running. These blocks, in writing up field-notes, were divided into 640-acre surveys, and the interior surveys were made without actually running the lines, and Elgin did not run all the lines of any section in blocks 27 and 97, unless, as he says, it was done by accident.

The field-notes of said blocks 27 and 97 have remained

on file in the general land office since they were filed therein and said lands are platted on the maps of said office. There are 33,280 acres of land in block 27, 611,000 acres in block 97.

16. Deputy Surveyors Berry and Williams had, prior to the adoption of the field-notes for Bacon and Graves, run lines and ascertained corners in blocks 27 and 97, and found them to be as correct as any work of that character in that part of the State, and were satisfied as to the substantial accuracy of said surveys.

Said surveys, so far as marked lines and corners were concerned and in accuracy of work, were equal to or better than any other surveying in that part of the State, except that done for the Texas and Pacific railway, which was unusually accurate.

17. In December, 1882, and in January, February, and March, 1883, Joel McKee was the surveyor of the Palo Pinto land district, and D. A. Williams and H. M. Berry were deputy surveyors under him.

20. Bacon and Graves, at the time of the application by them to purchase said lands, were not responsible parties, being worth less than $3,000 each, and had made no arrangements to procure more than enough money to pay for the filing, &c., of the field-notes, and afterwards, in February or March, 1883, the promise of a loan of $5,000.

24. On the 16th of May, 1883, Bacon and Graves tendered to the treasurer of the State $80,640.00, and on May 19, 1883, tendered to said treasurer the further sum of $104,640 in payment of surveys Nos. 118 to 291, inclusive, block "G," in Borden and Scurry counties; surveys Nos. 1 to 119, inclusive, block "M," Scurry county; surveys Nos. 1 to 52, inclusive, block "N," Scurry county; surveys 1 to 117, inclusive, block "B," Scurry county, and surveys 1 to 135, inclusive, block "G," Borden and Scurry counties, which said tenders were refused and declined by said treasurer. In January, 1891, Bacon and Graves paid to said treasurer on said lands $149,320, which was received by him under protest.

The conclusions of law were as follows:

"1. Bacon and Graves were not responsible parties at the time they applied to purchase this land, and could not purchase it under the law.

"2. They did not comply with the law by having the land surveyed, as was required by law, and therefore could not purchase it.

"3. The survey as adopted was not made in accordance with law—is incorrect, totally so—in having a greater frontage on permanent water than is permitted under the acts of 1879 and 1881.

"4. Bacon and Graves have never paid or offered to pay for said land until long after the expiration of the time allowed and required by law. The purported surveys of many of the sections of land for which they tendered payment on May 19, 1883, were made after the 50-cent act was repealed, and Bacon and Graves did not separate or offer to separate in their tender the surveys made before the repeal from those made after, and there was consequently no legal tender.

"5. At the time Graves entered into an agreement with Bacon to purchase these lands he was an employé of the general land office, and his action was against the civil and criminal laws of the State.

"6. I further hold that the State is not bound to return the money paid in January, 1891, to entitle it to a judgment for the land." (Record, p. 14.)

The court of civil appeals corrected the findings of fact of the lower court by finding as follows:

"We adopt the finding of facts filed by the court below, except from finding 20 strike out the words, 'Were not responsible parties,' and add to finding 24 the following: 'By the word "*protest*," as used in this finding, is meant that the treasurer of the State had several times refused to accept this money, and at the time he received it, in January, 1891, the parties paying fully understood that the State would contest their claim to this land, and the treasurer did not receive the money as a legal payment therefor.'" (Rec., p. 138.)

The Federal question as to the existence and effect of the contract alleged by the defendants under the act of July 17, 1879, and the alleged impairment of the obligation of that

contract by the act of January 22, 1883, was, as has been shown, expressly presented by the pleadings in the suit.

The validity of the act of 1883 as respects the alleged contract with the State under the act of 1879, and the rights of the defendants thereunder, was thus distinctly drawn in question as repugnant to the Constitution of the United States, and a right under that Constitution was thus specially set up and claimed by the defendants in their answer in the case.

In the court of civil appeals, on the appeal by the defendants from the judgment of the district court, the assignment of errors by the defendants presented the question as to whether they had acquired a vested right to the lands by the survey thereof, as made for them under the act of 1879, prior to the repeal of that act, which could not be affected by the repealing act of 1883, and the question as to the effect of the decisions of the supreme court of Texas in relation to surveying lands, as establishing a *rule of property* upon the subject, under which the lands in controversy were in all respects legally surveyed for the defendants upon their application under the act of 1879. (Record, p. 134, fol. 174; p. 135, fol. 175.)

The court of civil appeals held that there was no contract between the parties by reason of the surveys as made for the defendants under the act of July 17, 1879, and the court thus necessarily gave effect to the repealing act of January 22, 1883, which the defendants claimed, as stated, impaired the obligation of the contract in respect to the purchase of the lands, upon which they relied in the suit. (Opinion of the court of civil appeals, Rec., p. 138; p. 141, fol. 186.)

Motions for rehearing were made by Bacon and Graves and C. C. Gibbs, trustee, in the court of civil appeals, which were overruled by that court. (Motion of Bacon and Graves, Rec., pp. 147–154; motion of C. C. Gibbs, *ib.*, pp. 155–162.)

The former set forth, among other grounds for a rehearing, that the court of civil appeals erred in not holding that

by reason of the surveys as made the appellants had an executory *contract* with the State of Texas which entitled them to the lands in controversy upon the payment of the purchase-money. (Rec., p. 151, fol. 211.)

It maintained that the court ignored a *rule of property* established by repeated decisions of the Supreme Court, namely, the rule that an actual survey in the field by an official surveyor may be subsequently adopted by the surveyor who made it or by any other official surveyor who believes the survey to be a correct one, and a survey so made becomes the official act of the surveyor who made it, by adoption, and is in contemplation of law a valid survey and a legal appropriation of the public land, and this action was destructive of the vested rights of the appellants and contrary to article 2, section 10, and the fourteenth article of amendments of the Constitution of the United States. (Rec., p. 151.)

The latter motion also maintained that the court of civil appeals erred in not holding that the surveys made for appellants were legal surveys and appropriated the lands in controversy and gave them a vested right thereto, and that the deprivation of their property, through a new rule and a new construction of the laws of the State, as set forth, was the taking of their property without due process of law, constituted an impairment of the obligations of the contract entered into between the State and appellants, and was thus in violation of the tenth section of the second article of the Constitution of the United States, which provides that "*no State shall impair the obligation of contracts*," and in violation of the fourteenth article of amendments to the Constitution of the United States, which provides that "*no State shall deprive any person of life, liberty, or property without due process of law.*"

After the court of civil appeals had overruled the motions for a rehearing, the appellants duly presented an application to the supreme court of the State for a writ of error to

the court of civil appeals, which was refused by the supreme court, by an order entered on March 9, 1893, a copy of which is in the present record. (Rec., p. 162.)

This order was sent to the clerk of the court of civil appeals under the rules of the supreme court, which provide that upon a refusal by that court of an application for a writ of error the clerk shall transmit to the clerk of the court of civil appeals, to which the writ of error was sought to be sued out, a certified copy of the order denying such application. (Rules of the Supreme Court, 84 Texas, 695–697.)

The petition for the writ of error in such case remains, it is supposed, in the office of the clerk of the supreme court.

Under the rules of the supreme court no application for a writ of error can be entertained in a case wherein a motion for rehearing has not been made in the court of civil appeals and overruled by that court; and among the papers required to be presented to the supreme court with the petition for a writ of error is a copy of the motion for rehearing in the court of civil appeals. (Rule 1 of the Supreme Court, 84 Texas, p. 695.)

The assignment of errors filed in the court below on the allowance of the present writ of error distinctly presents the Federal questions raised upon the record, and which, it is maintained, were erroneously decided by the court of civil appeals in affirming the judgment of the district court in this case. (Assignment of errors, Rec., pp. 711–176.)

The present writ of error to review the judgment of the court of civil appeals was allowed by Mr. Justice Field on October 20, 1893.

ASSIGNMENT OF ERRORS.

I.

The court of civil appeals erred in deciding that the act of the legislature of the State of Texas entitled "*An act to withdraw the public lands of the State of Texas from sale,*" approved January 22, 1883, is not repugnant to the Constitution of the United States, in that the said act did not impair the obligation of a contract between the State of Texas and the plaintiffs in error in respect to the lands in controversy in this suit, and the purchase thereof under the act of the legislature of the State of Texas entitled "An act to provide for the sale of the unappropriated domain of the State of Texas and the investment of the proceeds of such sale," approved July 14, 1879, and amendments thereto, approved March 11, 1881, and in not holding that the said act of the legislature of Texas approved January 22, 1883, is repugnant to the Constitution of the United States, in that the said act impaired the obligation of a valid contract for the purchase of the said lands between the State of Texas and the said appellants arising under and created by the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881.

II.

The court of civil appeals erred in deciding that the said plaintiffs in error, E. M. Bacon and E. G. Graves, had not a valid contract with the State of Texas to purchase the said lands under the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881, the obligation of which was impaired by the said State by the said acts of the legislature thereof approved January 22, 1883.

III.

The court of civil appeals erred in deciding that the said plaintiffs in error had no vested interest in the said lands under and by virtue of the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881, which was impaired or affected by the said act of the State of Texas approved January 22, 1883, and in not adjudging that the said plaintiffs in error, under the said acts approved July 14, 1879, and March 11, 1881, had acquired a vested right and interest in the said lands by contract with the State of Texas, within the protection of the Constitution of the United States, which was impaired by the said act of the State of Texas approved January 22, 1883, in contravention of the said Constitution.

IV.

The court of civil appeals erred in not deciding that the plaintiffs in error, E. M. Bacon and E. G. Graves, by their application to purchase the lands in controversy under the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881, and the surveys of the same as made for them by the official surveyors before the passage by the said legislature of the said act approved January 22, 1883, and recorded in the office of the district surveyor and returned to the general land office of Texas, acquired a vested right in the said lands and a valid contract with the State of Texas for the purchase of the same under the said act of July 14, 1879, which the legislature of the State could not lawfully take away and impair by the repeal of the said act in and by the said act approved January 22, 1883.

V.

The court of civil appeals erred in not deciding that the plaintiffs in error had the right to pay the amount of the purchase price for the said lands after and notwithstanding the passage of the said act of the legislature of Texas approved January 22, 1883, which could not be defeated or affected by the refusal of the treasurer of the State of Texas to receive the same as tendered within the time prescribed by the said act of July 14, 1879, and in not deciding that after such tender and payment of the said purchase-money as made by them the State of Texas could not have and recover from the plaintiffs in error the lands in controversy in this suit.

VI.

It appearing by the record that the field-notes of said surveys as made for the said plaintiffs in error upon their application to purchase the said lands under the said acts of the legislature of Texas approved July 14, 1879, and March 11, 1881, described the lands in tracts of 640 acres and were made out, written up, signed, and dated by the surveyor making the same prior to January 22, 1883, the date of the said repealing act; that the said field-notes were duly recorded by the surveyor in his office, and that a map thereof was made; that the same were returned to and filed in the general land office of Texas within the time prescribed by the said act of July 14, 1879, and that said plaintiffs in error tendered the amount of the purchase price of said lands to the treasurer of the State under and within the time required by the said act of July 14, 1879, the court of civil appeals erred in not deciding upon such facts that the plaintiffs in error did comply with all the conditions and requirements of the said acts of July 14, 1879, and March 11, 1881, for the purchase and appropriation of the said

lands offered for sale under said acts, and thereby made a valid contract with the State of Texas for the purchase of said lands and acquired a vested right and interest in the same within the protection of the Constitution of the United States, which could not lawfully be impaired or affected by any subsequent law of the State, and that the said act of the legislature of Texas approved January 22, 1883, suspending the sale of the unappropriated public lands of the State, could not and did not impair the said contract of plaintiffs in error with the said State or take away their vested right in said lands or their right to complete their purchase under their said application and surveys.

VII.

The court of civil appeals erred in not holding that the field-notes of the surveys of Bacon and Graves having been made, written out, signed, and certified to in the language of the public statute of the State of Texas by the public officer making such field-notes prior to the 22d day of January, 1883, the same imported verity, and that the due record of the field-notes of the said surveys so made and recorded in the proper surveyor's office, and their due return to the general land office of Texas, and the tender of the purchase price of the land and subsequent receipt thereof by the State of Texas created and constituted a contract for the purchase of said lands between the State of Texas and the purchasers thereof, which was protected from abrogation or impairment by section 10, article 1, of the Constitution of the United States and section 1 of the fourteenth amendment of the said Constitution.

VIII.

The court of civil appeals erred in not holding, upon all the facts found, that the law embraced in article 3908, Revised Statutes of the State of Texas, as far as applicable to the issues in this case, was not a continuation of the old law

as it was aforetime in Texas up to the adoption of said article 3908, and that the adoption of said article was not the enactment of a new law, but merely a continuance of the old law as it aforetime was.

IX.

The court of civil appeals erred in failing to hold, upon all the facts found, that it was within the lawful and competent authority of the district and county surveyors of land in Texas, under all the laws of this State, when the said surveys were made, for the said Bacon and Graves, prior to the 22d day of January, 1883, to adopt the field-notes made by the former surveyors of the district, which they knew to be correct by verifying the same on the ground, and by such adoption to constitute such adopted field-notes good and valid field-notes and good and valid surveys.

X.

The court of civil appeals erred, on all the facts found and applicable to the issue, in not holding that the right of one official surveyor to adopt the field-notes made by a preceding official surveyor, which he believed to be correct, had, by reason of the numerous and uniform decisions of the courts of last resort in Texas, through a long period of time, affirming such right, and of the practice in regard to surveying the public lands thereunder, become so firmly established as to constitute a rule of property in Texas, and in not deciding, therefore, that if the field-notes made for plaintiffs in error were not in fact made in the field, but were the result of the adoption of prior surveys and field-notes made by the predecessor of the surveyor, who certified and returned them and who so certified and returned them with the knowledge of the correctness of such prior surveys and field-notes, obtained by going over the surveys on the

ground previously, such adoption, under this rule of property in Texas, constituted such field-notes of plaintiffs in error valid and sufficient field-notes and a legal and valid appropriation of the lands in controversy, creating a valid and binding contract of the State, and a vested right in said Bacon and Graves by the survey of the said lands as so made for them by the authorized official surveyor.

XI.

The court of civil appeals erred in adjudging that the surveys of the said Bacon and Graves, upon their application to purchase the lands in controversy under the said act of July 14, 1879, were not good and valid surveys, which entitled them, upon the payment of the purchase-money, to the said lands, thereby impairing the obligation of a contract between the State of Texas and the said parties and destroying the vested rights of said plaintiffs in error, in contravention of article 1, section 10, and the fourteenth article of the amendments of the Constitution of the United States.

XII.

The court of civil appeals erred, on all the facts found and applicable to the issue, in not holding that the repeal or suspension of the pre-existing law of Texas in relation to the sale of public domain of Texas at fifty cents an acre, which law existed prior to the repeal or suspension, on the 22d day of January, 1883, did not militate against the rights of plaintiffs in error in all lands that had been surveyed for them prior to the day of such repeal or suspension to correct the field-notes, if defective or irregular in fact, but not on their face; then that such field-notes, regular and valid on their face, could not, after such repeal or suspension, be assailed as invalid in fact by the State of Texas unless it were shown that the beneficiaries of such field-notes had knowledge of

their invalidity or fatal irregularity in time to have had them corrected and made to conform to the law prior to such repeal or suspension of said law.

XIII.

The court of civil appeals erred in not holding, in the presence of all the facts found in the record, that before the State of Texas could maintain the action for the recovery from plaintiffs in error of the lands in controversy, upon the ground that it had made no contract by reason of the surveys so made for Bacon and Graves, it was necessary for the State to tender or return to plaintiffs in error the full sum of one hundred and forty-nine thousand one hundred and twenty ($149,120) dollars, which said sum the State of Texas received from the plaintiffs in error as the full contract and purchase price of said lands placed in her treasury and appropriated and used for the same purpose as other moneys received by the State from other purchasers of lands under the same law were and are used and appropriated.

XIV.

It appearing that the lands were surveyed for the said Bacon and Graves by the proper surveyors of the proper land district, who adopted and copied the field-notes of previous surveys from the records of the office of the district surveyor, prior to the repeal of the said act of July 14, 1879, by the said act of January 22, 1883, which field-notes were written out and officially certified to in all respects as the law provides; that before writing out these field-notes the surveyors had been upon the same ground in making other surveys of the same lands, the field-notes of which were so adopted, and had seen enough of the adopted work by verifying the same to satisfy them of its entire correctness; that said field-notes were returned to the general

land office with the plat or map of the lands; that the purchase price, to wit, one hundred and forty-nine thousand one hundred and twenty dollars, was received by the State in payment for the same; that the proper receipts were prepared and signed, acknowledging the payment of the purchase price of the land, and were duly delivered to said plaintiffs in error, which sum of money is held and used by the State. The court of civil appeals erred in not adjudging, in view and by reason of such facts, that the State of Texas is precluded from denying that it made a contract with plaintiffs in error to sell the lands in controversy, and the State is estopped from denying that the said lands were so surveyed as to create a contract which binds it and which could not be impaired by repealing the said act of July 14, 1879, while and so long as it retains the money it so received for the said lands.

XV.

The court of civil appeals erred in affirming the judgment of the district court and in not reversing the said judgment, whereby the State of Texas had and recovered the said lands from the plaintiffs in error.

ARGUMENT.

FIRST.

This Court is not concluded by the opinion of the court of civil appeals of Texas that the surveys in controversy were invalid or not such as bound the State or the State was compelled to accept as vesting any rights in the plaintiffs in error, under the purchase act of 1879, *and that there was, therefore, no contract or contractural obligation to be impaired by the subsequent repealing act of* 1883.

1. The recent leading authority for this proposition is *Mobile and Ohio Railroad Company vs. Tennessee* (153 U. S., 486), which was a bill filed by the State against the railroad company to recover taxes for the years 1885 to 1889. The company defended upon the ground that the revenue statutes of the State, enacted subsequently to the granting of its charter, and under which the taxes sought to be recovered were levied, impaired the obligation of the contract contained in its charter, and were therefore unconstitutional and void. The supreme court of Tennessee decided in favor of the State upon the ground that the contract in the charter was itself invalid, for the reason that it violated the constitution of the State, and, moreover, was so vague, indefinite, and uncertain in its terms as not to be enforceable; and it was contended that this court was therefore "without jurisdiction to review the judgment of the supreme court of Tennessee, because it was based upon the ground that there was *no contract in existence between the railroad company and the State to be impaired.*"

But the Court, Mr. Justice Jackson delivering its judgment, said:

"It is well settled that the decision of a State court holding that as a matter of construction a particular charter or a charter provision does not constitute a contract is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a State, by its terms or necessary operation, gives effect to some provision of the State law which is claimed by the unsuccessful party to impair the contract set out and relied on. This court has jurisdiction to determine whether such a contract exists as claimed, and whether the State law complained of impairs its obligation."

Mr. Justice Jackson concluded his examination of the subject as follows:

"The ground upon which the supreme court of the State held that *the contract claimed by the railroad company under the eleventh section of its charter was invalid in no way affected the jurisdiction of this Court.*

"The legal existence of the contract itself and its proper construction is necessarily involved in the question of the alleged impairment of the obligation thereof."

Chief Justice Waite, speaking for the Court in *Wright vs. Nagle* (101 U. S., 794), said:

"If the court below *erred in construing the statute* and in holding that there was *no contract, then the question is presented whether the subsequent action of the commissioners is equivalent to a law of the State impairing the obligation of the contract.* In this way a Federal question is presented which gives us jurisdiction."

2. It has been seen that the defendants below in their answer specially set up and claimed a legal purchase of the lands by application, survey, tender of the purchase-money, and payment, under the act of 1879, and that—

"Having in all respects fully complied with the law in respect to the purchase of said lands under which said lands

were offered for sale by the plaintiff, their rights thereto became vested, and the act of the legislature subsequent thereto repealing said law was, under article 2, section 10, subdivision 1, of the Constitution of the United States, null and void as affecting defendants' vested rights." (Rec., p. 7.)

The legal existence or non-existence of the contract, and the rights thereunder asserted in the defense of this action by the State, is one which this Court will determine for itself, independently of any adjudication by the State court.

SECOND.

The omission, intentional or otherwise, of the court of civil appeals of Texas to expressly notice or specifically pass upon the validity of the repealing act of 1883, *as against the plaintiffs in error, does not defeat or impair the jurisdiction of this Court. The judgment of the court below in favor of the State and against the plaintiffs in error for the lands in suit necessarily gave effect to the repealing act of* 1883.

1. Chief Justice Waite, in *Chapman vs. Goodnow* (123 U. S., 540, 548), said :

" We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by *evading* a direct decision thereon as by positive action. If a Federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right within the meaning of *section 709* of the Revised Statutes as if it had been specifically referred to and the right directly refused."

Mr. Justice Harlan, in *Chicago Life Ins. Co. vs. Needles* (113 U. S., 574, 579), speaking for the Court, said:

"The supreme court of Illinois did not in terms pass upon one claim directly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States; but the final judgment necessarily involved an adjudication of that claim. This Court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States has been withheld or denied by the judgment below."

The same principle was applied in *Louisiana vs. Pilsbury* (105 U. S., 278), where, although the supreme court of Louisiana expressly *declined to pass upon the validity of the State act of 1876*, challenged by the bondholders as impairing the obligation of their contract, and rested its decision upon the sole ground that the act of 1852, under which the bonds were issued, was invalid, as in contravention of the State constitution, this Court, nevertheless, held that it *had* jurisdiction to reverse the judgment of the State court, and reversed that judgment upon the ground that, in its opinion, the act of 1852 was not repugnant to the State constitution, but was valid legislation.

It was in that case, also, that Mr. Justice Field, speaking for the Court, reaffirmed the doctrine, particularly applicable to the question, in this case, upon the laws of Texas in regard to surveys under the act of 1879, that the settled judicial construction of a statute is, so far as contract rights are concerned, as much a part of the law as the text itself.

"The doctrine upon this subject is aptly and forcibly stated by the Chief Justice in the recent case of *Douglass vs. County of Pike*, 101 U. S., 677, 687. 'The true rule,' he observes, 'is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment—that is to say, make it prospective,

not retroactive. After a statute has been settled by the judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.' (See, also, *Gelpcke vs. City of Dubuque*, 1 Wall., 175; *Havemeyer vs. Iowa County*, 3 *id.*, 294; *Thomson vs. Lee County*, *id.*, 327; *Lee County vs. Rogers*, 7 *id.*, 181; *Chicago vs. Sheldon*, 9 *id.*; *Olcott vs. The Supervisors*, 16 *id.*, 678; *Fairfield vs. County of Gallatin*, 100 U. S., 47.)"

Louisiana *vs.* Pilsbury, 105 U. S., 278.

2. The judgment of the court below in favor of the State for the lands in controversy necessarily *gave effect* to the repealing act of 1883, which was relied upon by the State in its reply *by supplemental petition to the answer of the defendants*, although the act of 1883 is not specifically named in that pleading. (Rec., pp. 8, 9.)

It is expressly averred in the "*supplemental petition*" that "*said lands were not at the times named by defendants on the market for sale.*"

Why were the lands "NOT ON THE MARKET FOR SALE" when the defendants did the acts set forth in their answer necessary to complete their purchase?

If the lands were not then "*on the market for sale*," it was solely by reason of the passage of the act of 1883, which *withdrew* the public lands of the State from sale; and it was to that act the State *referred* and it was upon that act the State *relied*, when it alleged in its supplemental petition, by way of *avoidance* of the answer of the defendants, that "SAID LANDS WERE NOT AT THE TIMES NAMED BY THE DEFENDANTS ON THE MARKET FOR SALE."

It is also averred in this replication of the State that "if said defendants did in fact *tender* the treasurer the sum of money named, *in 1883*, as alleged, the treasurer properly *refused and declined to receive* the same, for that the defend-

ants had not purchased the same from plaintiff by complying fully with any *existing law* authorizing the purchase and sale thereof; and if said defendants did in fact *pay* to the treasurer, in 1891, the sum named in said answer, the said treasurer was not authorized *by law* to receive it," etc.

The obvious and intended meaning of this pleading of the State by way of replication, is that at the time of the tender by the defendants of the purchase-money, under the act of 1879, and within the period required by that act, and at the time the money was actually paid, the act of 1879 was not an "*existing law*," the same having been repealed by the act of 1883, and that the treasurer for that reason had no authority to receive their money, and properly declined to receive it, as against the legal right vested in the defendants to tender and pay the purchase-money in the time limited by the act of 1879, the repealing act to the contrary notwithstanding.

It is manifest from this pleading of the State in the suit that it sought to maintain its asserted right to recover the lands, as against the equitable title to them set up by the defendants in their answer, *by and under the act of 1883*, which withdrew the public lands of the State from sale, and in effect repealed the act of 1879.

The judgment of the State court upon the pleadings, that the State recover the lands, necessarily gave effect to the act of 1883, relied on by the plaintiff, and impugned by the defendants as unconstitutional, as against the right to the lands claimed by the defendants in their answer under the act of 1879, although the opinion of the court apparently proceeded upon the ground that there was no contract by the State to sell the lands by reason of the character of the surveys, as surveys which it was said the State was not bound to accept under the act of 1879.

THIRD.

It is clear, upon the construction and effect of the Texas sales act of July 14, 1879, *that when in the course of the proceedings to acquire lands under that act the point or step of a survey was reached, there existed a contract between the State and the applicant, and a vested right in him, which the legislature could not impair or take away.*

1. The act of 1879 was passed by the sixteenth legislature, convened in extra session by proclamation of the governor June 10, 1879, and contained the "*emergency clause,*" and had the act been passed, as contemplated, by a two-thirds vote, it would have gone into immediate effect upon its approval, July 14, 1879. The act was passed upon the recommendation of the governor in his message to the legislature, which advised the immediate inauguration of the policy of expeditiously selling off all the public lands of the State, amounting to 15,000,000 of acres, in order to pay off the public debt of the State, amounting to $5,500,000. (See Brief for Bacon and Graves, pp. 1, 2, 3.)

2. The act provided that any person or corporation desiring to *purchase* any of the lands therein reserved for sale might "*do so*" by causing the same *to be surveyed by the authorized public surveyor of the district in which the land was situated,* and it was made the duty of the *surveyor,* upon the application of a responsible party, to survey the lands designated in such application within *three months* from the date thereof, and within *sixty days* after the survey to certify to, record, and map the field-notes of the survey, and return to and file the same in the general land office.

The act provided that within *sixty days* "after the return to and filing in the general land office of the surveyor's cer-

tificate, map, and field-notes of the land desired to be purchased" it should be "*the right* of the person or corporation who has had the same surveyed to pay or cause to be paid into the treasury of the State the *purchase-money* therefor at the rate of fifty cents per acre."

And it was further declared that "upon the presentation to the commissioner of the general land office of the receipt of the State treasurer for such purchase-money, said commissioner *shall issue* to said person or corporation a patent for the tract or tracts so surveyed and paid for."

Section 7 of the act declared that "it shall be the *duty* of the commissioner of the general land office to give such general and specific *instructions to surveyors in relation to the surveying of the public lands under the provisions of this act as may best subserve the interests of the State and carry into effect the intent* and purpose of this act."

The legal presumption, of course, is that the commissioner, as was his official duty, gave the surveyors such general and specific instructions in relation to making surveys under the act, and that particular surveys as made upon applications to purchase under the act conformed to such instructions.

3. It is thus very evident upon the face of the enactment that when a person making application to purchase lands offered by the act for sale, caused the lands to be surveyed by the authorized surveyor of the district, the *State contracted*, upon the purchaser's complying with the other requirements of the act, that it would convey to him the land surveyed.

And so it was decided by the supreme court of Texas in the leading case of *White vs. Martin*, 66 Texas, 340 [1886], and reaffirmed in *Jumbo Cattle Company vs. Bacon and Graves*, 79 Texas, 12 [1890].

In the case of *White vs. Martin* the party filed, under the act of 1879, an application for a survey of the lands desired with the surveyor who surveyed the lands before the repeal of the act. The field-notes, however, were not returned to

and filed in the general land office of the State until after the act was repealed.

The supreme court held that the survey gave a vested right to complete the purchase so as to bind the State.

The supreme court said:

"How may the applicant become the purchaser? The statute answers the question. He may do so by causing the tract or tracts to be surveyed. When this is done, as the act contemplates, *then*, and not before, *the State contracts*, upon the purchaser's complying with the *other requirements* of the act, *that it will convey to him the land surveyed.* When this point was reached there existed an executory contract which gave the purchaser a vested right upon complying with his part of the contract to have the lands purchased, of which subsequent legislation cannot deprive him. On the faith of the State's promise the applicant expends money to have the lands surveyed or incurs obligation to pay. The survey was made for the appellee within the time prescribed, and *thus was vested his right.*"

In *Jumbo Cattle Company vs. Bacon and Graves* the application was filed with the surveyor, and the field-notes and surveys were made before the act of 1879 was repealed; but *the field-notes were neither recorded in the surveyor's office nor filed in the general land office, nor was the money paid or tendered until after the act was repealed.* It was held that the surveys gave a right to perfect the title, which could not be impaired by the subsequent legislation repealing the act of 1879, although, as stated, the money was not tendered to the treasurer until after the repeal of the law.

The supreme court said:

"The question is as to the effect of the act of January 22, 1883, which repealed the acts (of 1879 and 1881) under which appellees made application to purchase the lands. The application had been made and the land had been surveyed when the repealing act took effect. Had the appellees *then acquired a vested right which the legislature could not take away?* Or at the time the act last referred to went into operation was there existing be-

tween the State and the appellees a *contract* which the State could not impair by a repeal of the law under which it was consummated? The ruling in *White vs. Martin* (66 Tex., 340) is decisive of the question. The only difference between that case and the case now before us is that in the former the purchase-money (which was not tendered until after the repealing act took effect) was received by the State treasurer. In the present case *the treasurer refused the tender*. It is too plain for argument *that the action of the treasurer could not affect the right of the parties.* If, notwithstanding the repeal, the purchaser still had the right to complete his purchase by a compliance with the terms of the law under which his application and survey had been made, the treasurer could not defeat that right by refusing to receive the money. In the case cited it was held there was a *vested right which was not destroyed by the repealing act*" (of 1883).

The supreme court further said that under the act of July 14, 1879, *the expenses of the surveys, in connection with the price to be paid to perfect the title, constituted a sufficient consideration to support the contract.* "It cannot be treated," said the court, "*as a mere gratuity or bounty on the part of the State.*"

There is nothing to the contrary in the case of *Campbell vs. Wade* (132 U. S., 37), decided at October term, 1889, which, indeed, recognizes the principle, affirmed by the supreme court of Texas, as above shown, that a right to purchase was conferred by a survey so as to bind the State under the act of 1879.

In that case there was no survey prior to the repeal of the act, and the party had done nothing but file his application for a survey.

A survey in Texas has always created a vested right, independently of the statute of July 14, 1879, which itself puts the question at rest by its express provision that after the survey it shall not be lawful for any one to *file or locate upon the land.* (Art. 4795, Sayles' Civil Statutes of Texas.)

This Court held, *in Campbell vs. Wade*, that "the State was

under no obligation to continue the law in force because of the *application* of any one to purchase. It entered into no such contract with the public. The application did not bind the party to proceed any further in the matter, nor, in the absence of other proceedings, could it bind the State to sell the lands."

FOURTH.

The surveys of the lands in suit as made for the plaintiffs in error Bacon and Graves, upon their application of December 1, 1882, *to purchase the lands under the act of July* 14, 1879, *were valid surveys of the lands by the laws of the State of Texas as expounded by all the departments of its government and administered in its courts up to the decision in the present case.*

1. The deputy surveyors did not actually survey the lands on the ground for Bacon and Graves, but they adopted the Elgin survey, which was an actual and accurate survey made on the ground. (Finding 15, Rec., pp. 12, 13.)

Prior to adopting the Elgin survey for Bacon and Graves the deputy surveyors, Berry and Williams, had been upon the ground, and by actual field-work had ascertained that the survey was substantially accurate, and the Elgin survey, as far as marked lines and corners were concerned and in accuracy of work, was equal to or better than any other surveying in that part of the State except that done for the Texas and Pacific railway, which was unusually accurate. (Finding 16; Rec., p. 13.)

The State of Texas recognized the Elgin survey as accurate and leased and sold lands under it. (See *Jumbo Cattle Co. vs. Bacon and Graves*, 79 Texas, p. 10.)

The testimony in respect to the manner in which these surveys were made is in the record. (J. E. Elgin, Rec., p. 41; Joel McKee, p. 34; H. M. Berry, p. 68; E. A. Williams, p. 67.)

2. The validity of the surveys involved in this case is established by the authority of the decisions of the supreme court of Texas in the cases which will now be referred to and the principles upon which they are founded.

Howard vs. Perry, 7 Tex.:

This was a suit in which a deputy surveyor made the survey, he being interested in the survey individually. Under the law such survey was void; but the surveyor (principal) adopted such field-notes by his approval, and the court declared them legal and valid, and that after the approval they appropriated the land embraced in their superficies. This survey was made over a former survey, under which, by not complying with conditions of the law, the party for whom it was made forfeited his rights, and the court said that "by virtue of the subsequent location the locator became possessed of an inchoate right protected by constitutional guaranties of the rights of property." Subsequent to the last location the legislature sought by act to revive the right of the first locator and make it superior to that of the deputy surveyor, but the court ignored the act and held the survey of the deputy, after approval by his principal, to appropriate the land. (265, 266.)

Horton vs. Pace, 9 Tex.:

The entry in this case for a survey was "located one league of land on the San Antonio road, Gaudalupe, east side, being league No. 1." This land, as noted, had been previously surveyed for one Brown. The court says:

"We do not *question* the surveyor's right *to adopt a previous survey* that he *thinks correct*, as was done in the case of Scott *vs.* Linn (3 Tex., 97), but we do not admit that it was the duty of the court to oblige him (by mandamus) to adopt one shown to be incorrect." (83, 84.)

Jenkins vs. Chambers, 9 Tex.:

This case is very similar in its facts to that of Howard *vs.* Perry, *supra*. In this case, however, there was no resurvey of the land by deputy or principal surveyor, but the survey had been made for the party who claimed under it, but who by the law was not entitled (just as in the case at bar). The court says:

"With the evidence before him that there had been a legal survey by competent authority it was not necessary that the Commissioner should have caused a resurvey nor was it necessary that he should embody in the title the authority under which the survey was made." (231–'2.)

Styles vs. Gray, 10 Tex.:

Ann Gray owned a land certificate, by virtue of which she was entitled to land. The surveyor did not make an original survey for her, but adopted field-notes which had been made by virtue of a distinctly different certificate. The objection was that Ann Gray had no survey. The court said, "If Ann Gray had the first location, that would give the preference to her, and it is not material that the survey had been made under a different certificate," but subsequently applied to her prior location. Suppose that the survey had been made on a certificate which *was afterwards raised, or on one* found to *be invalid*, there could be no sort of objection to the surveyor's *applying his work* to a good and valid certificate previously located. It would be worse than useless to require him to do his work over again, when he could verify its correctness without such useless labor and expense. (506–507.)

Chadoin vs. McGhee, 20 Tex.:

Chadoin, without present evidence of right, caused a league of land to be surveyed. Several years thereafter he obtained a right to procure that quantity of land.

Without a second survey being made, the surveyor applied the acquired rights to the old survey. There was a

conflicting subsequent claim, based on a location and actual survey of the land on which patent issued. The field-notes on the one hand and the patent on the other constituted the contest as to which was the superior right—equitable title on the one hand and legal title on the other. The court said:

"In respect to the question of title, it will suffice for the present to observe that it appears from defendant's answer that he was admitted as a colonist by Austin and Williams, and permitted, as we historically know the practice was, to select land already surveyed. * * * The application and field-notes were returned (1835) with the archives of the colony to the general land office. After the opening of the land office he obtained (1838) his certificate. Having obtained his certificate without delay, he had the right, we think, to have it applied to his survey and to have patent therefor, * * * if he did not delay unreasonably and unnecessarily until the rights of third parties intervened." (481, 482.)

Stafford vs. King, 30 Tex.:

This suit involved the question whether the lands in controversy could be identified, and incidentally whether any survey of them had been made. There was great discrepancy in the calls, in both distances and objects and quantity. The court held on the facts as follows:

"It is the duty of the surveyor to run around the land * * * to be embraced in the survey and patent * * * and point out and identify the land * * * and to extend the identifying objects into the field-notes, * * * and until the reverse is proved it will be presumed that the land was surveyed and the boundaries plainly marked, * * * but if it be established by undoubted evidence that the land was not in fact surveyed, * * * the patent will not be held void, if the land can, by any reasonable evidence, be identified." (269, 270.)

In this case no location or survey was alleged or proved (260). The distance called for was 3,160 varas by the surveyor, but the court cut the distance down to 750 varas, because the survey could be identified on the ground within the shorter distance and could not be in the longer. (275.)

Jones vs. Burgett, 46 Tex.:

This case is quite similar to Stafford *vs.* King, *supra*, the calls incongruous, conflicting, and of doubtful identification on the ground, leading on the whole to the reasonable belief that the survey was not made on the ground, but that the lines were projections to run for quantity and close, and this vague survey was adopted, and the court says:

"King's block consists of 115 leagues, joining or at least purporting to join a solid block of squares, with common corners; was surveyed by a company of three surveyors in 1840, Terrell and Casey being two of the company. Many of the certificates proving fraudulent, the surveys became vacant. The survey of league 40 (the one in controversy) purports to have been made by Terrell in 1844. The identity of the field-notes with those of the survey in 1840 * * * makes it probable that he (Terrell) simply adopted the field-notes of Casey, who purports to have made the original survey (292)."

The adoption of the survey was sustained. (293.)

Thomson vs. Railway, 68 Tex.:

The surveyor did not run out the lines (1874), but ran such lines as enabled him to correctly make out field-notes of the several tracts in controversy. These surveys were made prior to the time he had any evidences of right (certificates) to land in his possession. The certificates afterward applied (by adoption) to these surveys were then located on other lands, and they and the field-notes made by virtue of them then (between 10th November and 7th December) being in the general land office.

Subsequently, 16th December, 1874, the railway abandoned the old surveys because on patented lands, and procured certified copies of the certificates (which it had the right to do) and delivered them to the surveyor to be applied to the field-notes made before, as stated. On the 26th December, 1874, he made the application by adopting the said field-notes theretofore made without again going on the ground and returned them and the copies of certificates to the general land office. There was nothing on the face of the field-notes to show any irregularity in them. In November, 1881, Thomson located over the locations of the railroad made as aforesaid. It was contended by Thomson that the railway had no legal or equitable right because the survey was not made on the ground and because the surveys were made in the first instance when he had no land certificates in his possession. The court said:

"If the facts show that the railway, *within the spirit of the law*, caused the land which it claims to be surveyed by virtue of valid land certificates over part of the vacant public domain, *as against* the *State*, it had an equitable title, and this cannot be defeated by the subsequently attempted appropriation of the same land by Thomson, if he had notice of the prior appropriation by the railway. * * * At the time the surveyor made the surveys in the first instance he had no authority to do so, the certificates then being in the general land office, * * * but it is not claimed that the surveys were not properly made (395–'6). * * * To hold that the designation of land by boundaries and natural and artificial objects actually ascertained and fixed by surveying all the lines was then (1874) required to give validity to a survey, by which is meant a description of land for identification rather than the actual work done by the surveyor to enable him to give such a description, would be fraught with consequences *so grave* that nothing short of a *statute* clearly requiring such a construction would justify it. It has been held that a surveyor might adopt a survey formerly made." (397.)

Duren vs. Railway, 86 Tex.:

This case is similar to the one of Howard *vs.* Perry, *supra*. The survey was made by a deputy, who was interested in the subject-matter, and therefore in law void; but the court holds that after the survey was adopted by the surveyor they became his act and the survey thereby validated. (291.)

Sandford vs. Gunter, 84 Tex., was a case where the surveyor had been on the ground and made a hurried and defective and limited meandering of the river, from which he projected field-notes in his office, and gave as a reason for not doing the work on the ground that the Indians made work in the field dangerous. The courts upheld the surveys. (284, 285.)

Doswell vs. De La Lanza, 20 Howard, U. S., is a case where a survey was made without authority of law, being outside the jurisdiction of the deputy who made it. The Court, following Texas cases, held that when such void survey was adopted by the proper surveyor it thereby became validated. (33.)

Spencer vs. Lopsley, same report, holds that surveys made in anticipation of need of them, when recognized by the proper officer, become valid—citing some of the Texas cases *supra*. (271, 272.)

FIFTH.

The surveys of these lands as made for the plaintiffs in error, Bacon and Graves, upon their application to purchase the lands under the act of July 14, 1879, were valid and legal surveys of the lands under article 3908 of the Revised Statutes of Texas of 1879, which article only continued in force the law as it was established prior to those statutes.

1. Article *3908* of the Revised Statutes of Texas, which went into effect September 1, 1879, contains nine subdivisions, as follows:

"The field-notes of every survey shall state:"

"1. The county or land district in which the land is situated."

"2. The certificate or other authority under or by virtue of which it is made, giving a true description of same by numbers, date, where and when issued, name of original grantee and quantity."

"3. The land, by proper field-notes, with the necessary calls and connections for identification (observing the Spanish measurement by varas)."

"4. A diagram of the survey; and,"

"5. The variation at which the running was made."

"6. It shall show the names of the chain-carriers."

"7. It shall be dated and signed by the surveyor."

"8. The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same; and also that such survey was actually made in the field, and that the field-notes have been duly recorded, giving book and page."

"9. When the survey has been made by a deputy, the county or district surveyor shall certify officially that he has examined the field-notes, has found them correct, and that they are duly recorded, giving book and page of record."

Subdivision 8 of this article, and the law of Texas as it existed *theretofore*, may be usefully placed side by side as follows:

Subdivision 8 of Article 3908, Revised Statutes of Texas of 1879.	*The Old Law as it Existed Theretofore and as Construed by the Court in the Cases Cited.*
"The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same; and also that such survey was actually made in the field, and that the field-notes have been duly recorded, giving book and page."	§ 19. "The surveyors shall make oath before the respective commissioners, truly and faithfully to discharge the duties of their office." § 20. "The course of the lines shall be determined by the magnetic needle, and care shall be taken to determine its variations from the pole in the district where the surveys are made." § 21. "The surveys shall be made with great caution, with metallic chains made for the purpose, and care shall be taken that the place of beginning the survey of each parcel of land be established with certainty, taking the bearing and distance of two permanent objects at least." (Sayles' Early Laws, vol. 1, p. 100.)

Section 22 of the final title of the Revised Statutes of 1879, p. 720, declares that the Revised Statutes shall take effect September 1, 1879, at 12 o'clock meridian.

The sales act of July 14, 1879, was passed at the same extra session of the *Sixteenth Legislature*.

It contains the "*emergency clause*," and had the act been passed, as contemplated, by a *two-thirds vote* it would have gone into *immediate effect* on its approval, July 14, 1879, long before September 1, when article 3908 of the Revised Statutes became operative, and in that case acticle 3908 of the Revised Statutes, as such, could have had no application to surveys made *under the act of 1879*, because article 3908 was not in force July 14, 1879.

The proviso to section 20 of the final title of the Revised Statutes expressly declares "*that any law passed by the Sixteenth Legislature in conflict with any provision of this act* (*the Revised*

Statutes) shall be the law of this State, this act to the contrary notwithstanding."

The report of the commission of codifiers relating to the Revised Civil Statutes of Texas contains the following certain statements, which are of great importance in arriving at the legislative intention in enacting article 3908, in so far as it contemplates and requires an actual survey on the ground.

Under title 79, Public Lands, the commission say:

"The object being to collect under one general head all the laws now in force relating to the disposition and sale of the public domain, and which provide the mode and manner of acquiring titles to land from the State, as distinguished from lands belonging to individuals, it seems more appropriate that the title should be 'The Public Lands.'

"The commission have left out all land laws which are now inoperative and which do not furnish a rule of action for the future, and also such as in their judgment ought to be repealed or superseded, and after revising and digesting the laws in force have arranged the different subjects into twelve chapters, and as near as may be in their natural order.

"The material changes are very few and the more important are here noted, as follows:

"1. The different land certificates, which for the most part form the foundation of Texas land titles, are defined and classified, referring in the margin to the laws under which they were issued. It furnishes in a condensed form the necessary information and serves to explain what are the different land certificates which are required to be located within five years after April, 1876, and for which duplicates may issue in certain cases.

"2. It regulates the mode and manner of making entries and locations and provides that no survey shall hereafter be made until after entry, etc. This will protect the *bona fide* locator against locations and surveys made in the field of which he could have no notice. It also provides for entries where part of the land lies in another land district.

"3. A pre-emption is a preference right to buy. A donation on condition of three years' residence, etc., is not a pre-

emption. Chapter 8 provides for pre-emptions and furnishes the mode by which a settler may enter 160 acres of land and may have twelve months' time in which to pay for it, etc. We have followed in some respects the provisions of the United States statutes relating to the same subject, and also relating to homestead donations treated of in another chapter.

"4. We have also furnished more definite rules by which the settler may make entry upon the public domain and after three years' residence obtain title to a homestead donation.

"5. The provisions of chapter 2, page 582, relating to land reservations seem to be all that is necessary to retain on that subject.

"The work of the commission under this title was submitted to the Commissioner of the General Land Office for his examination and criticism, and we acknowledge our indebtedness to him for suggestions as to some of the amendments adopted." (See Sayles' Texas Civil Statutes, volume 2, pages 732, 733.)

And under final title, General Provisions, page 739, volume 2, Sayles' Civil Statutes, the commission says:

"Section 19 provides that the Revised Statutes, where substantially the same as the laws now in force, shall not be construed as repealing the latter or as new enactments thereof, but merely as a continuance of them."

And in closing the report, pages 940, 941, volume 2, Sayles' Civil Statutes, the commission says:

* * * "We are under special obligations * * * to the late Commissioner Groos, as well as his successor, Mr. Walsh. * * * Without their aid it would have been almost impossible to have prepared in so short a time the titles 'Archives,' 'County Boundaries,' 'Public Lands,' 'University, School, and Asylum Lands.'

"Such as it is we now submit the work to you to be laid before the legislature, whose duty it will be to examine and pass upon it. It will be their duty, because, under the Constitution, they will become responsible for it and become its authors if it goes into force.

"Still, while the Constitution and laws make them responsible for the work and require them to pass upon it, it must be borne in mind that in the nature of things the time to be devoted by them to that examination must necessarily be short, and the examination itself, however carefully conducted, unavoidably very imperfect.

"The entire time of a session of the usual length would not suffice for the purpose; and when it is remembered that a great portion of the session must necessarily be consumed in carefully preparing the different and necessary appropriation bills, and in providing the ways and means for supplying deficiencies and supplying funds necessary to meet the actual expenses of the Government for the next ensuing two years, it will at once be seen that the examination of these bills cannot possibly be as complete as it ought to be.

"Recognizing this to be the fact, we have endeavored to adhere, as nearly as possible, to the old law, so as to render less arduous the labor of examination. No great or radical changes, therefore, have been made and no startling or strange innovations in our system have been introduced."

Section 23 of the final title of the Revised Statutes of Texas, page 720, is also an authority in point and shows that the legislature adopted the Revised Civil Statutes as reported by the codifiers without careful deliberation, and that the intention of the commission became the intention of the legislature.

"SECTION 23. Because this bill cannot be read in one day or on three several days, an imperative public necessity exists requiring that the constitutional rule that the same be read on three several days should be suspended, and it is therefore suspended."

Section 19 of the Revised Statutes of Texas, page 719, declares:

"That the provisions of the Revised Statutes, so far as they are substantially the same as the statutes of this State in force at the time when the Revised Statutes shall go into

effect, or of the common law in force in this State at said time, shall be construed as continuations thereof, and not as new enactments of the same."

Section 3 of the final title of the Revised Statutes of Texas, page 718, declares:

"SEC. 3. That the rule of the common law that statutes in derogation thereof shall be strictly construed, shall have no application to the Revised Statutes, but the said statutes shall constitute the law of this State respecting the subjects to which they relate, and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice."

2. It is manifest that it was not the intention of the codifiers or the legislature to enact a new law on the subject of surveys, but that their purpose was to continue in force the law as it existed aforetime.

It is not disputed or doubted that all laws in force in Texas prior to the Revised Statutes contemplated and required an actual survey on the ground; nor can it be disputed or doubted, under the decisions of the supreme court of Texas, that one surveyor always had the right to *adopt* the work of another which he believed to be correct, and that surveys so made by adoption were as valid as original surveys and segregated the land embraced by them from the public domain.

After all, as said by Chief Justice Stayton in *Thomson vs. Railway* (68 Tex., 397), a legal survey is a description of land for its identification rather than the actual work done by the surveyor to enable him to give such a description.

The object of this whole article, *3908*, is to secure a definite survey of land under official authority by virture of a legal right and to perpetuate the act; and when this has been accomplished the law is satisfied and confirms the right acquired. No matter whether this has been done under article 3908—the law as it existed theretofore, under the

special provisions of the purchase act of 1879 or under the provisions of any other act.

The purpose of subdivision 2 of article 3908 is for identification of the certificate or other right by virtue of which the survey is made, and without which it could not be known by what authority the survey is made or whether by any legal authority, and when the description is sufficiently full to identify the claim or right to land with certainty the object of the subdivision is attained, though all of the directory requirements may not have been inserted for such identification. For instance, a description of the certificate by its number, quantity, and name of original grantee would with certainty and definiteness identify the certificate, and such description would to all intents and purposes be a compliance with the spirit of the provision of law, notwithstanding the date of the certificate when issued and where issued should be omitted.

Subdivision 3 of article 3908 contains the *spirit* of the entire article, and its purpose is to identify the land surveyed. *The land must be described by proper field-notes, and the field-notes must contain the necessary calls and connections for identification;* and when this is done in such a way as to segregate the proper quantity of land and give a description thereof by which it can subsequently be identified the life of the article is preserved, the spirit of the law is obeyed, the object thereof is attained, and the right thereunder is vested, no matter whether the actual work on the ground to obtain such description has been done by the surveyor who certifies the field-notes or by some other official surveyor whose work he had inspected and found to be correct, as in the case at bar.

The object of subdivision 8 of article 3908 is to evidence officially and affirmatively the correctness of the survey; that it was made according to law, and that the survey was actually made in the field. Under former laws the surveyor was required to certify the correctness of the

survey. It has always been contemplated and required that the survey should be made according to law, and it was and is the universal custom of surveyors to so certify. The certificate of the surveyor required by this subdivision of article 3908 is merely a statement of fact, an evidence of what has been done, and if it be conceded that this provision for an official certificate for evidence of what has been done expressly contemplates and specifically requires an actual survey on the ground, still it must be admitted that it *is merely and only the requirement of the law in force prior thereto and is a continuance thereof and not a new enactment with reference to actual surveys in the field;* so, conceding that the official certificate here required contemplates an actual survey in the field, *it does no more than an unbroken line of decisions by the Supreme Court holds was contemplated and required by all laws in force prior thereto.* There is not even a dissenting opinion holding to the contrary.

The surveyors who made the surveys in controversy certified the correctness of the surveys, and that they were actually made in the field according to law, and this certificate is true in every essential particular. The surveys are substantially accurate and definite; they were actually made in the field, and they were well made. About this there is and can be no question, for *there is no finding of the court which questions the substantial accuracy of said surveys; but, on the contrary, the court finds the surveys to be substantially correct, and also that they were actually made in the field by Elgin, and that Berry and Williams had, by their own work in the field, ascertained that the survey was so made, and the finding of the court is that it is one of the best surveyed blocks in that part of the State of Texas.*

SIXTH.

It follows from the preceding argument that at the time the repealing act of January 22, 1883, went into operation there was existing a perfect contract between the State and Bacon and Graves, the plaintiffs in error, which gave the latter a vested right upon their complying with their part of the contract to have the lands embraced by the surveys in controversy, the obligation of which the State could not impair by a repeal of the law under which their application and surveys had been made.

1. The surveys being legal and valid surveys under the settled law of Texas at the time they were made, Bacon and Graves acquired the right to complete their purchase and perfect their title by compliance with the terms of the act of 1879, and this was a *vested right* which the legislature could not take away or destroy.

Before the repealing act went into operation they had made application particularly describing the lands they desired to purchase; they had filed their application with the authorized surveyor of the district in which the lands were situated; they had satisfied him that they were responsible parties; they satisfactorily paid him the fees to which he was entitled under the law, as appears by the fact that the surveyor did the work; and they designated the act under which they desired to purchase.

Having done this, they did all that the law required or contemplated they should do in *causing the land to be surveyed.*

It was the duty of the surveyor by the third section of the act to survey the designated land, and this was to be done, as contemplated in section 7 of the act, under such instruc-

tions, general or special, as the commissioner of the general land office was required to give.

The surveys were, in fact, made, and the *presumption* is that the surveyor made them in accordance with the general and specific instructions of the land commissioner. The surveys as made were valid surveys under the law of Texas.

2. The application having been made and the land having been surveyed, when the repealing act took effect, there was "existing between the State and the parties a *contract* which the State could not impair by a repeal of the law under which it was consummated."

Such is the language of the supreme court of Texas in the case of the *Jumbo Cattle Company*, decided in 1890, above cited.

The doctrine thus recognized is the well-settled one that the lawful repeal of a statute cannot be made to destroy contracts which have been entered into under it. The contracts being legal when made, they remain valid, notwithstanding the repeal of the law.

McCauley *vs.* Brooks, 16 Cal., 1.
Commonwealth *vs.* New Bedford Bridge, 2 Gray, 337.
State *vs.* Phalen, 3 Harr., 441.
State *vs.* Hawthorn, 9 Mo., 389.

SEVENTH.

After the contract was thus made the district surveyor certified to and recorded in his office the field-notes, and they were returned to and filed in the general land office, and the land commissioner received the filing fees for the benefit of the State within the time required by the act of 1879, and the full purchase-money for the land was tendered to the treasurer within the time prescribed by that act.

1. The plaintiffs in error thus complied in all particulars with their part of the contract, and they had the right to a patent for the lands in respect to which they tendered the purchase-money. (See findings of the court 4 to 10, inclusive, Rec. p. 11; opinion of the court, Rec., p. 143.)

The fifth section of the act provided:

"SEC. 5. Within sixty days after the return to and filing in the general land office of the surveyor's certificate, map, and field-notes of the land *desired to be purchased*, it shall be the right of the person, firm, or corporation who has had the same surveyed to pay or cause to be paid into the treasury of the State the purchase-money therefor at the rate of fifty cents per acre, and upon the presentation to the commissioner of the general land office of the receipt of the State treasurer for such purchase-money, said commissioner shall issue to said person, firm, or corporation a patent for the tract or tracts of land so surveyed and paid for."

By the proceedings taken by the parties for the purchase of the lands upon the offer of the State the right to a patent vested in them under the act of 1879, and this may be treated as equivalent to a patent issued, vesting in them, at least, the full equitable title to the lands as against the State of Texas.

As said by the supreme court of Texas:

"If, notwithstanding the repeal, the purchaser still had the right to *complete his purchase by a compliance with the terms of the law under which his application and survey had been made*, the treasurer could not defeat that right by refusing to receive the money."

Jumbo Cattle Co. *vs.* Bacon and Graves, 79 Texas, 12.

That the parties *had* the right to complete their purchase by a compliance with the terms of the law under which the surveys were made for them, notwithstanding the act of 1883, is beyond all question.

The repealing act could not operate to destroy the vested right of the parties to acquire the full legal title of the lands as purchasers from the State.

EIGHTH.

It follows from the preceding argument that the court of civil appeals erred in not deciding that the surveys as made for Bacon and Graves were legal surveys under the Revised Statutes of Texas, which created a binding contract between the State of Texas and those parties, by which the parties acquired a vested right to have the lands purchased of which no subsequent legislation could deprive them.

1. The theory of the court below in respect to the intended effect of article *3908* of the Revised Statutes of Texas, if we understand it, is unsound, as has been shown, we submit, by the foregoing argument.

It was not the intended purpose or object of the enactment to make a change in the mode of making surveys which would change a *rule of property* long established and recognized by the supreme court of the State, opening wide

the floodgates of litigation on the subject of land titles in Texas.

The presumption is that it was the intention of the codifying commissioners to leave the law of survey substantially as it was before this revision and digest of it.

The presumption in regard to every such revision is that it is declaratory of the existing law and not the enactment of a new and different law, especially where an established rule of property would be affected by a particular provision of the statutes.

2. But the court below admit that it was in the power of the officers of the State to accept field-notes and ratify surveys, which would thereby become valid, notwithstanding the effect which would seem to be given to this particular article of the Revised Statutes; and it is also admitted that the field-notes in question could not be attacked as invalid by a "third party."

NINTH.

The court of civil appeals erred in not holding that the State of Texas was precluded and estopped from maintaining in this action that there was no contract between the State and the plaintiffs in error, under the act of 1879, in respect to the purchase of the lands sought to be recovered by the State.

1. It conclusively appears that all the officers of the State government named in the act of 1879 as entitled to participate in the execution of the statute have recognized by their official acts the validity of the surveys in question, upon which the contract claimed by the plaintiffs in error was based.

The commissioner of the land office received and filed the field-notes in his office, receiving the fees for filing the

same for the benefit of the State, and it must be presumed that he approved the surveys as made and returned.

The dates of the surveys disclosed conclusively and the land commissioner knew, of course, how they were made, but he interposed no objection to receiving and filing the field-notes in his office and taking the official fees therefor. The land commissioner thus recognized the field-notes as valid and sufficient under the sales act of 1879.

The treasurer of the State, Mr. Lubbock, took the purchase-money under direction of the attorney general of the State, Mr. Hogg, and executed his official receipts therefor in the usual form, acknowledging the amount received, *$149,120*, to be in full payment for the land sought to be recovered by the State in this action.

Mr. Lubbock testified as follows:

"My reason for receiving the payment rendered on the 3d of January, 1891, is that the then attorney general of Texas, Hon. J. S. Hogg, advised me to do so.

"When Mr. Frank Hamilton brought the money in and indicated his intention or desire to make the payments I did send for the Hon. J. S. Hogg, attorney general, who came into my office and advised me to receive the money. (I had also consulted him before in regard to what course I, as State treasurer, should pursue in case the tender was made.)

"Upon some difference of opinion between Mr. Hamilton and I, as to what kind of receipt I should execute for the money, the attorney general was sent for the second time, and then advised me to execute the kind of receipt as indicated by Mr. Hamilton, that being a receipt for each section of land covered by the payments.

"The amount paid was $149,120, and was paid on lands as indicated in the receipts issued and delivered, and by the records of the State treasurer's office one-half the money was deposited to the credit of the public fund, the other half to the payment of the bonded debt.

"The chief clerk had charge of the moneys of the office, and a few days thereafter I ceased to be State treasurer; therefore cannot answer the other questions."

Record, pp. 62, 63.

The receipt given for each section by the treasurer is as follows:

"No. 10077. TREASURER'S OFFICE,
"AUSTIN, TEXAS, *January* 3, 1891.

"Received of C. C. Gibbs, trustee, on account of E. M. Bacon and Everett G. Graves, the sum of three hundred and twenty dollars, the same being payment in full on 640 acres unappropriated public lands in Borden and Scurry counties, under '*An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale.*' SURVEY 1, BLOCK G.
"F. R. LUBBOCK, *Treasurer.*"

The "SURVEY" was thus recognized as valid and sufficient by the treasurer of the State.

When Attorney General Hogg became the governor of the State he had, under section 10 of the act, the direction of the investment of the money received for the lands.

Section 10 provides:

"One-half of the net proceeds of sale under the provisions of this act shall be set apart for the benefit of the public schools of this State, and the comptroller of public accounts shall, *under and by direction of the governor, invest the same* in interest-bearing bonds of the State of Texas, or if said bonds are not to be obtained, then in interest-bearing bonds of the United States, the interest therefrom to be paid into the treasury as part of the available school fund. The balance of the net proceeds of sale under the provisions of this act shall be applied by the proper authorities to the payment and extinguishment of the bonded debt of the State of Texas as the same becomes due and payable."

Under the authority of these provisions of the sales act of 1879 the governor directed the comptroller of public accounts to invest the purchase-money in interest-bearing bonds of the State or the United States, as would appear from the testimony of the treasurer of the State, Mr. W. B. Wortham, who succeeded Mr. Lubbock, and who

stated in his testimony that "*the money was deposited to the funds, as is provided by law, mingled with the other moneys of the State, and paid out in accordance with law on the comptroller's warrants and orders of transfer.*" (Rec., p. 59.)

Thus it would seem the land commissioner, two treasurers, the comptroller, the attorney general, and the governor of the State of Texas participated, by their official acts, in the completion of the sale to the plaintiffs in error of the lands sought to be recovered by the State in this action.

2. The question is thus presented whether the State of Texas, upon the facts disclosed, can be allowed to maintain, for the purposes of this action, that there was no *contract* between the State and these parties in respect to the lands under the act of July 14, 1879?

Having received and used for public purposes the money for the lands, can the State be heard to say that the surveys as made were not in conformity to law and originated no contract between it and the proposed purchasers under the act of 1879?

It is respectfully submitted that there are no principles of right and justice known to the law upon which these questions can be answered in the affirmative.

The court of civil appeals in this case said:

"It will be borne in mind that the question presented for decision in this case is not whether the field-notes made out as indicated in the first part of this opinion constituted such a *survey* as the officers of the State *could adopt should they see proper to do so*, nor whether it is such an absolute nullity as could be taken advantage of by a *third* party, but the question is, Does it constitute such a *survey* within the meaning of the law as the State can be compelled to accept *in opposition to its wishes? The appellants are seeking to enforce against the State an executory contract, and base their right to do this upon the ground that they have complied with their part of such contract.* In such case we think they should show that they have obtained the field-notes in the manner the State said they should be obtained in its proposition, and

not that they have got as good field-notes in some other way as would have been obtained had they complied with the State's offer." (Record, p. 141, fol. 186.)

If we understand this opinion, it is conceded that the field-notes in this case constituted such a survey as the "officers of the State *could* adopt, should they see *proper to do so;*" that it was competent and within the power of the *officers of the State* to accept the field-notes as a good survey, *if they choose to do so;* that the survey as made by the adoption of the field-notes of the old, original survey was not void, but only voidable, and that the officers of the State only could not be *compelled* to accept the field-notes in opposition to their "*wishes.*"

It is plain that there is no holding by the court below in this case that the field-notes returned into the general land office by the district surveyor for Bacon and Graves were *void*, and that the entire theory of the opinion is that they were at the most *voidable* by the "*officers of the State,*" who could accept them as originating a contract between the State and the purchasers, if they *wished to.*

Who were these "*officers of the State*" who could "*adopt*" the field-notes in this case, "*should they think proper to do so;* and did they "adopt" the present field-notes?

Certainly, the officers referred to by the court below are none other than the land commissioner, the treasurer, the attorney general, the comptroller, and the governor of Texas, all of whom had to do with the transaction of recovering from these parties the full purchase-money of the lands *under the present field-notes.*

Clearly, these "officers of the State" *did* see proper to adopt the field-notes in question, and *did* adopt them for the State, and the State cannot be allowed now to say that there never were any field-notes upon which to predicate a contract with it for the purchase of the lands in controversy.

The question of the validity of the field-notes and of a contract between the State and the plaintiffs in error is closed in this action.

TENTH.

The court of civil appeals erred in not reversing the judgment of the district court of Mitchell county and directing that court to render and enter a judgment for the defendants in the action.

J. Hubley Ashton,
Thomas D. Cobbs,
Counsel for Plaintiff in Error, C. C. Gibbs, Trustee.

MAY 6 1896
JAMES H. MCKENNEY

IN THE

SUPREME COURT OF THE UNITED STATES.

Spring Term, 1896.

No. 603.

E. M. BACON, E. G. GRAVES, and C. C. GIBBS, Trustee, Plaintiffs in Error.

v.

THE STATE OF TEXAS,

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

BRIEF FOR PLAINTIFFS IN ERROR, BACON AND GRAVES.

[15,448.]

CHAS. W. OGDEN,
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Attorneys for plaintiffs in error. Bacon and Graves.

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The Legislature of Texas was convened in extra session June 10, 1879, by proclamation of the Governor, in which he said:

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"First—To make appropriations for the annual payment of the interest on the public bonded debt of the State and for a sinking fund for the ultimate discharge of said debt, if not otherwise paid.

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$5,5000,000, and thereby save the necessity of imposing on the people, as soon as practicable, taxes to pay the interest on it, now amounting annually to near $400,000.

"Third—To make an appropriation of a specific amount for the annual support of the free common schools, out of the interest of the State and railroad bonds, now over $3,000,000 in amount, and so much more out of the general revenue as can be spared therefrom after providing for the prompt payment of the necessary expenses of an efficient and economical State government, and to repeal all laws and parts of laws that undertake to set apart or designate the amount of said annual appropriation for said purpose, in advance of or differently from the said specific appropriation now to be made, in order that hereafter each recurring Legislature may be left entirely free to determine the amount that can be safely appropriated specially forsaid purpose under the then existing financial condition of the State.

"Fourth—To provide for the sale more expeditiously of the lands belonging to and set apart to the free school permanent fund, amounting now, in surveyed and unsurveyed lands, to about thirty-five millions of acres; and the investments of the proceeds thereof in order to raise a large fund in the shape of interest-bearing bonds, to enable this State, as soon as possible, 'to establish and make suitable provision for the support and maintenance of an efficient system of public free schools,' which is required by the Constitution, which has not yet been done or even approximated by the very large appropriation of one-fourth of the entire revenue raised by taxation annually, aided by the interest of $3,000,000 of State and railroad bonds belonging to its fund, and never can be by a dirct State tax, without the aid of a large fund yielding interest, and it may be not then without the aid of voluntary local taxation as is done in other States."

(Message of Governor Oran M. Roberts to the Legislature of the State of Texas, extra session, convened in Austin June 10, 1879, pp. 4, 5.)

"The sale of the public lands, the University, Asylum and Public Free School lands:

"In my inaugural and messages again submitted for

your consideration, I endeavored to urge the propriety of immediately inaugurating the policy of expeditiously selling all of these lands. It will take fifty years to extinguish our public debt by the two per cent sinking fund, the lands will be gone long before that time, and the people will have to be taxed to pay the debt in the end and the interest of it in the meantime.

"The scholastic population is increasing faster than the public free school fund, That means increased taxation to preserve the present standard of schools. There are now about thirty-five millions of acres of school lands, which ought to increase the present school fund from three to fifteen or twenty million dollars. With such a fund drawing interest, we might hope indeed to build up and maintain an efficient system of public free schools, with the aid of a light tax that would hardly be felt. Equally as good reasons may be given for the sale of all the other lands. I respectfully recommend one commissioner be appointed to sell all of these lands under the direction and sanction of a board of executive officers; that an appropriation be made to pay his salary and incidental expenses, and that each class of land shall be made to bear the expense of selling in proportion to the value of its land that may be sold. I have good reason to believe that with the facilities thus furnished, and upon extensive publications being made to let it be known, great quantities of land can be rapidly sold, and that it will be the best and fastest way to settle the country with a good population. I deem this a matter of great importance to the public interest in many respects, but especially as it looks to a more speedy closing up of the interest that the State has in lands, and will relieve the people from taxes in proportion to the lands sold. (Idem, p. 15.)

In pursuance of the foregoing recommendations of the Governor, the purchase act appended to this brief was passed. There is also appended the appealing act of 22nd January, 1883.

The further statement of the case is as follows:

Second.

December 2, 1882, Bacon and Graves applied to purchase the 298,240 acres of land involved in this suit; their application particularly designated the lands herein and other lands which they desired to purchase; and also designated the acts of 1879 and 1881, under which they applied to purchase. (See application, record, page 21.) December 1, 1882, this application was received, filed and recorded by the surveyor of Palo Pinto land district, who was the proper officer to whom application to purchase this land should have been made. (See finding of the court 1 and 2, record, pages 10 and 11.) Bacon and Graves were responsible parties. (See opinion of the court, record, pages 142–143.) The surveyor under took to survey the land designated, and through his deputies, Berry and Williams, the surveys were made. (See testimony of Surveyor McKee, record, pages 66–67.)

In December, 1882, and in January, 1883, Berry and Williams were deputy surveyors of Palo Pinto land district, under Joel McKee, who was the surveyor of that district. (See finding of the court 17, record, page 13.) On the 17th, 18th, 19th, 20th, 21st and 22d of January, 1883, these deputy surveyors certified to the field notes of this land as having been surveyed by them according to law. (See findings of the court 4 to 10 inclusive, record, page 11.) These deputy surveyors were under oath and bond to faithfully perform their duties as such. (Revised Statutes of Texas, article 3840.) The certificate these deputy surveyors made of these field notes was prescribed by law (see subdivision 8, article 3908, Texas Revised Statutes), and were made strictly in accordance therewith. (See testimony of Land Commissioner McGaughey, record, page 63, and Exhibits B and C thereto, record, pages 64 and 65.) Joel McKee was the surveyor of Palo Pinto land district; he was under oath and bond to faithfully perform his duties as such (see Revised Statutes

of Texas, article 3835), and he examined, approved, certified as correct and recorded these field notes. (See findings of the court 4 to 10 inclusive, record, page 11; and 13, record, page12; also McKee's testimony, record, page 67.) The certificate of correctness made by this district surveyor was prescribed by law (see subdivision 9, article 3809, Revised Statutes of Texas), and was made strictly in accordance therewith. (See McKee's certificates, record, pages 53 to 56, 91 to 99, and 119 to 124 inclusive.) These field notes were returned and filed in the General Land Office, and the Land Commissioner received the filing fees for the benefit of the State, within the time required by law. (See findings of the court 3 to 10 inclusive, record, page 11.) The full purchase money for this land was tendered to the treasurer within the time required by law, and was refused by him. (See opinion of court, record, page 143.) The purchase money was paid January 3, 1891 (see finding of the court 24, record, pages 13–14), and the money was received by the treasurer, who acted under the advice of the attorney-general (see Treasurer Lubbock's testimony, record, pages 62–63), and the purchase money was deposited in the treasury, as provided by the act under which the payment was made, one-half to the credit of the public free schools of the State, to be invested in interest-bearing bonds of the State or United States; and the other half to the payment of the bonded debt of the State. (See section 10, act of July 14, 1879, and Treasurer Lubbock's testimony, record, page 63.) The receipts for the purchase money were in the usual form—a separate receipt for each section, and acknowledged such payment to be in full for 640 acres of land, under act of July 14, 1879. (See Treasurer Wortham's testimony, record, page 59 and Exhibit A thereto, record, page 60.) The purchase money was was never repaid nor tender thereof made to plaintiffs (see opinion of court, page 142), but was mingled with

other money of the State and paid out in accordance with law on the Comptroller's warrants. (See Treasurer Wortham's testimony, record, page 59.)

Third.

The deputy surveyors did not actually survey this land on the ground for Bacon and Graves, but they adopted the Elgin survey, which was an actual and accurate survey made on the ground. (See finding of the court 15, record, pages 12–13.) Prior to adopting the Elgin survey for Bacon and Graves, the deputy surveyors, Berry and Williams, had been upon the ground, and by actual field work, had ascertained that the survey was substantially accurate (see finding of the court 16, record, page 13), and said Elgin survey, as far as marked lines and corners were concerned and in accuracy of work, was equal to or better than any other surveying in that part of the State, except that done for the Texas and Pacific railway, which was usually accurate. (See last clause finding of court 16, record, page 13)

Fourth.

The State of Texas recognized the Elgin survey as accurate, and leased and sold said lands under said survey as made by Elgin. ("The appellants hold possession as lessees of the * * * State to the even section," see Jumbo Company vs. Bacon and Graves, 79 Texas, page 10.) John Moore and his brother bought one section from the State at one dollar per acre and ten sections at two dollars per acre in 1884. (See his testimony, record, page 91,)

Fifth.

Under direction of Land Commissioner Hall, Surveyor Strong in 1887 and 1888, adopted the United States survey of the whole of Greer county. (See Hall's testimony, record, 79-80); Corwin, under instructions from Land Com-

missioner Walsh, in 1883 and 1884, adopted the survey of 2,000,000 acres of land as previously surveyed under the acts of 1879-1881, and as surveyed for the Texas and Pacific Railway Company (see his testimony, record, 82); and R. M. and T. A. Thomson, under instructions of Land Commissioner Walsh, adopted surveys which they had previously made of 1,000,000 acres of land. (See Walsh's testimony, record, 81-82.)

Ninth Assignment.

The Court of Civil Appeals erred in failing to hold, upon all the facts found, that it was within the lawful and competent authority of the district and county surveyors of land in Texas, under all the laws of the State when the said surveys were made, for the said Bacon and Graves, prior to the 22d day of January, 1883, to adopt the field notes made by the former surveyors of the district, which they knew to be correct by verifying the same on the ground, and by such adoption to constitute such adopted field notes good and valid field notes and good and valid surveys.

Fourteenth Assignment.

It appearing that the lands were surveyed for the said Bacon and Graves by the proper surveyors of the proper land district who adopted and copied the field notes of previous surveys from the records of the office of the district surveyor prior to the repeal of the said act of July 14, 1879, by the said act of January 22, 1883, which field notes were written out and offiically certified to in all respects as the law provides; that before writing out these field notes the surveyors had been upon the same ground in making other surveys of the same lands, the field notes of which were so adopted, and had seen enough of the adopted work by verifying the same to satisfy them of its entire correctness; that said field notes were returned to the general land office with the plat or map of the lands; that the purchase price, to-wit, one hundred and forty-nine thousand one hundred and twenty dollars, was received by the State in payment for the same; that the

proper receipts were prepared and signed acknowledging the payment of the purchase price of the land, and were duly delivered to said plaintiffs in error, which sum of money is held and used by the State. The Court of Civil Appeals erred in not adjudging, in view and by reason of such facts, that the State of Texas is precluded from denying that it made a contract with plaintiffs in error to sell the lands in controversy, and the State is estopped from denying that the said lands were so surveyed as to create a contract which binds it and which could not be impaired by repealing the said act of July 14, 1879, while and so long as it retains the money it so received for the said lands.

Proposition.

Under the statutory requirement as to surveying public lands, the Supreme Court of Texas, from the very foundation of the government, for more than fifty years, without an exception or even a dissenting opinion, uniformly held it competent, legal, and valid, to survey land as this land was surveyed for the plaintiffs; and all the departments of the State government have so held and so acted, up to the decision in this case.

Authorities.

Howard v. Perry, 7 Texas, 266.
Horton v. Pace, 9 Texas, 84.
Jenkins v. Chambers, 9 Texas, 231.
Styles v. Gray, 10 Texas, 504.
Chadoin v. Mcghee, 20 Texas, 481.
Jones v. Burkett, 46 Texas, 293.
Lapsley v. Spencer, 20 Howard, 272.
Doswell v. De La Lonza, 20 Howard, 33, and authorities there cited.
Duren v. Railway, 86 Texas, 291.

The Duran case, supra, was decided in 1883, and the opinion is as follows:

"It seems that the survey and field notes were made by an agent of the locators, and were approved and

adopted by the lawful surveyor. This is certainly a practice not to be commended, and one which it would seem the Legislature did not contemplate. Therefore, if the question were an open one, we might have difficulty in reaching the conclusion that a survey made by a locator for his own benefit could be adopted by the surveyor so as to give it any validity. But it was held in Howard v. Perry, supra, that this could be done. It is true that in that case the locator was himself the deputy surveyor, but the court seem to attach no importance to that fact. In the opinion they say: 'But it is objected to the defendant's survey that it was made by and for himself. It is, however, approved by the district surveyor, and thereby became, in contemplation of law, his act.' And we apprehend that the deputy had no authority to make a survey for himself, and that validity of the survey depended wholly upon the approval of the district surveyor. Such is our construction of the opinion, and it is decisive of the point before before us. Whatever our own views may be upon the question as an original one, it has been too long recognized as a rule of property in every department of the State government to be now overturned."

Remarks:

The question is, Did the State of Texas contract to sell this land to Bacon and Graves?

The solution of this question determines the rights of plaintiffs in error; for if a contract existed, plaintiffs have vested rights under it, and the State violated the obligations of the contract when it deprived them of the land, either by legislative act or by judicial decision.

The purchase act of 1879 and 1881 authorized the contract to be made. Was it made—did the minds of the contracting parties meet?

On the part of the State, only three persons could have been concerned in making the contract. These were the

officials of the State named in the act—the State Treasurer, the Commissioner of the General Land Office, and the surveyor (the district surveyor and his deputies.)

These officers being the only ones named in the purchase act, it devolved upon some one or more of them to represent the State in contracting with plaintiffs.

Which of these officials represented the State in contracting to sell this land?

The only duty of the State Treasurer was as defined in section 5 of the act, where it is declared "* * * it shall be the right of the person, firm or corporation who has had the same surveyed, to pay or cause to be paid into the Treasury of the State the purchase money therefor at the rate of fifty cents per acre. * * *" And plaintiffs could not be deprived of their right by the refusal of the Treasurer to receive the purchase money; for in Jumbo Cattle Co. vs. Bacon and Graves, 79 Texas, 12, it is held "it is too plain for argument that the action of the Treasurer could not affect the rights of the parties."

The duties of the Land Commissioner were twofold, those purely ministerial, as provided in section 3 of the act, to receive and file the map and field notes in his office as provided by law in other cases; and as provided in section 5 of the act that "upon the presentation to the Commissioner of the General Land Office of the receipt of the State Treasurer for such purchase money, said Commissioner shall issue to said person, firm or corporation a patent for the tract or tracts of land so surveyed and paid for." These acts of the Land Commissioner in receiving and filing the map and field notes, they being in due form, and in issuing the patents for the land, were purely ministerial, and in so doing he did not represent the State in making the contract, except in taking the filing fees for the benefit of the State; but he had other duties under the law which were discretionary, and in the

doing of which he did represent the State in contracting for the sale of this land. Section 7 of the act declares that "it shall be the duty of the Commissioner of the General Land Office to give such general and specific instructions to surveyors in relation to the surveying of the public lands, under the provisions of this act, as may best subserve the interests of the State, and carry into force and effect the intent and purposes of this act."

Under this provision of the act, the Land Commissioner was not empowered to contract with purchasers for the sale of the land, but he was required to give instructions, general and specific, as to the manner in which the surveyor should survey the land. It was clearly his duty to give such instructions as he deemed would best subserve the interests of the State, and carry into force and effect the intent and purposes of the act. And the presumption is, that the Land Commissioner performed his official duty—that he gave the surveyors such general and specific instructions; and the presumption must be indulged, that the surveyor made this survey in accordance therewith; for under the purchase act specially, and the law in other cases, generally, it was the duty of surveyors to observe the instructions given them by the Commissioner.

Authorities:

Instructions by Commissioner of General Land Office.

Peacocock v. Hammond, 6 Tex., 548-9.

Lewis v. Durst, 10 Tex., 415.

Bates v. Thompson, 61 Tex., 342.

Presumption that officer does his duty, A. and E. Encyclopedia of Law, Vol. 19, p. 43, and note 1.

Presumption that surveyor does his duty, until the contrary appears.

Phillips v. Ayres, 45 Tex., 605.

Stafford v. King, 30 Tex., 269-270.

Under section 9 of this act, the Land Commissioner alone was authorized to contract for the sale of lands surveyed under the act, which had been forfeited for nonpayment of the purchase money. And he was authorized to do so on the sole condition that the purchaser should pay into the treasury the purchase money therefor.

Section 3 of the act declares that "it shall be the duty of the surveyor to whom application is made by responsible parties, to survey the land designated. * *" The surveyor determined that plaintiffs were responsible parties, and the Court of Civil Appeals has so held in this cause. So the surveyor, acting under such instructions, general and specific, as the Land Commissioner may have given him, was authorized to contract with plaintiffs for the purchase of this land; and his official survey of the land constitutes the executory contract.

But the State contends that it was the duty of plaintiffs to cause the land to be surveyed.

To this we do not accede in the sense the State contends; but we do concede that purchasers were bound to do and perform every duty and obligation which the law laid on them. And on this proposition the question arises:

What should plaintiffs have done; and what did they do?

They should have made application particularly describing the land they desired to purchase; they did so (see application, record, 2); they should have filed their application with the authorized surveyor of the district in which the land was situated; they did this (see finding of the court 1 and 2, record 10-11); they should have satisfied him that they were responsible parties; they did this (see opinion, record, 142-143); they should have satisfactorily paid him the fees to which he was entitled under the law; this they did (as shown by the fact that the

surveyor did the work); and they should have designated the act under which they desired to purchase, and this they did (see application, record, 21). And when this had been done, plaintiffs had done all they could do, and all the law contemplates they should do in causing the land to be surveyed. Then the third section of the act declares, "It shall be the duty of the surveyor * * * to survey the land designated * * *"; and this is to be done as contemp'ated in section 7 of the act, under such instructions, general and specific, as the Land Commissioner was required to give.

See Throckmorton v. Price, 28 Tex., 609-10.

Fitch v. Boyer, 51 Tex., 349.

Land Commissioner v. Chisholm, 71 Tex., 527.

Bassett v. Brewer, 74 Tex., 556.

De Montel v. Speed, 53 Tex.. 342, and authorities cited.

Magee v. Chadoin, 30 Tex., 652, et seq.

McGregor and Darling v. Hall, 3 Stewart and Porter (Ala.), 402-404.

McDonal v. Leach, Kirby (Conn.), 72.

The State offered to sell this land to plaintiffs on the sole condition that they would cause the land to be surveyed. This they did, as contemplated by law. They particularly designated the land they desired to purchase; they filed this designation with the authorized surveyor of the district in which the land was situated; satisfied him that they were responsible parties; paid him his legal fees, and calling his attention to the law under which they sought to purchase, they requested him to survey the land. Could they have done more; did the law contemplate that they should do more? Can the State be heard to say there is no contract, because its official agent, whose duty it was, and who had received his legal fees therefor, surveyed the land under such general and specific instructions as the Land Commissioner

may have given him, and as the Supreme Court had from the very foundation of the government uniformly held was competent, legal, and valid?

Can the State say there was no contract, when these purchasers had thus done all they could do, and all the law contemplated they should do, in causing the land to be surveyed? And that, too, when the surveyor, in selling the land, was to the extent of his duties the agent of the State; and the law presumes that this officer did his duty within the scope of his jurisdiction and power: when this particular officer, under his official oath and bond that he would faithfully perform his duties, certified that he had done so? This certificate was required by law; and the field notes certified by his deputy were examined and certified as correct by the district surveyor, under his official oath and bond; and so certified, the field notes were received and filed by the Land Commissioner, who received the filing fees allowed by law for the benefit of the State. And following all this, the State received the purchase money for the land so surveyed, placed it in her treasury, mingled it with her other funds, and appropriated it to her own uses, as provided in the act under which the land was sold; and has never repaid nor tendered payment thereof to plaintiffs. Does not this constitute a contract in law? Can the State repudiate the official acts of her authorized official agents, and thus impair such contract? If technicalities and irregularities there were in the survey, as claimed by proofs aliunde the face of the contract, certified officially under the oath and bond of the agent of the State authorized to make the contract, was not the receiving of the filing fees and the purchase money, and the appropriation and use thereof, a waiver of such technical irregularities, and an affirmation and confirmation of the regularity and legality of the survey?

The rule announced in the proposition supra was uniformly acted on by public surveyors, even after the adoption of the Revised Statutes.

Bonnell says (record, p. 73), that "when a surveyor had partially run and identified the lines of a prior survey, and found the survey correct, he would not go again upon the ground in surveying lands under the acts of 1879 and 1881, but would have copied the original field notes of record in the surveyor's office. The custom and practice of surveyors under such circumstances was to adopt all former work that had been found correct." Gano says (record, p. 72), "the land office was perfectly familiar with the custom of surveyors in locating lands." Munson says (record, p. 77), "I know of several cases where lands had been previously surveyed, and field notes recorded, where surveyors, who were familiar with the survey, adopted them without going a second time on the ground"; and on page 78, he says, "the custom of surveying lands under the acts of 1879 and 1881 was the same as that adopted in surveying other large blocks."

The rule was recognized by the Revised Statutes.

Article 3900, Revised Statutes, provides that where field notes of a survey have not been returned to the land office within the time prescribed by law, the owner of the certificate . . . "shall have the right to relocate the same certificate or other evidence of legal right to land upon the same survey, but without being compelled to have the same resurved." . . .

The rule was expressly recognized by the purchase act of 1879.

Section 9 of the act provides that where a survey has been made under that act and the lands become forfeited for non-payment of the purchase money . . . "the land so surveyed may be sold by the commissioner of the gen-

eral land office to any other person, firm or corporation, who shall pay into the treasury the purchase money therefor."

Land Commissioners Walsh and Hall acted on the rule after the adoption of the Revised Statutes.

In 1883 Commissioner Walsh instructed Corwin to select lands previously surveyed, and adopt and return the field notes of 2,000,000 acres (see Corwin's testimony, record, p. 82, and Walsh's testimony, record, p. 80), and Walsh authorized R. M. and T. A. Thomson to adopt their own prior surveys of 1,000,000 acres (see Walsh's testimony, record, pp. 80–81), and in 1887 and 1888 Commissioner Hall authorized Strong to adopt the United States survey of the whole of Greer county. (See Hall's testimony, record, pp. 79–80.)

We desire, in this connection, to distinguish this case from that of Telfener v. Russ, decided by this court on the day of present term.

That case was lacking in all the substantial and meritorious facts which pertain to this one. In that case there was no survey, and no return of field notes and maps, of all land involved in the subject matter of controversy at the time the contract was made, no payment of nor tender of purchase money, for more than 25 sections of the million and more acres. This case stands contra to that one on all these points. It is manifest from the record, that plaintiffs in error used all the means allowed by the law, tocomply with the law. In that case the field notes were mythical. Here there was an adoption of field notes that were actually made on the ground, by official authority,and which were known to have been made on the ground, and to have been correctly made by those who adopted them, and which field notes so adopted were delineated on the maps of the general land office and were there recognized and the land sold and leased by said field notes.

But this court differentiates this case from that, where it holds that the surveys were of no validity unless made upon the ground, and adds: "And it is not shown that they were made or could be made in any other way."

Tenth Assignment.

The Court of Civil Appeals erred on all the facts found and applicable to the issue in not holding that the right of one official surveyor to adopt the field notes made by a preceding official surveyor, which he believed to be correct, had, by reason of the numerous and uniform decisions of the courts of last resort in Texas through a long period of time, affirming such right, and of the practice in regard to surveying the public lands thereunder, become so firmly established as to constitute a rule of property in Texas, and in not deciding, therefore, that if the field notes made for plaintiffs in error were not in fact made in the field, but were the result of the adoption of prior surveys and field notes made by the predecessor of the surveyor who certified and returned them and who so certified and returned them with knowledge of the correctness of such prior surveys and field notes obtained by going over the surveys on the ground previously, such adoption, under this rule of property in Texas, constituted such field notes of plaintiffs in error valid and sufficient field notes and a legal and valid appropriation of the lands in controversy, creating a valid and binding contract of the State and a vested right in said Bacon and Graves by the survey of the said lands as so made for them by the authorized official surveyor.

Proposition.

The rule thus established, approved, and tested by all the departments of the State, became a rule of property—to all intents and purposes, and as much the law as if enacted by the Legislature; so that without express legislative requirement, the Supreme Court could not change the rule in this case; and in attempting to do so, the court assumed legislative functions which it could not exercise, and impaired the obligations of plaintiffs' contract.

Authorities.

In Thomson v. The Railway, 68 Texas, 397, it was said, that to do so " . . . . would be fraught with consequences so grave that nothing short of a statute clearly requiring such a construction would justify it. It has been held, that a surveyor might adopt a survey formerly made" (citing decisions so holding). In Craig v. Redford, 4 L. C. P. Co., page 468 (3 Wheaton, U. S.), it is held, "An act directing the duty of surveyors of lands . . . . is merely directory to the officer, and it does not make the validity of the survey to depend upon the conformity of the officer to its requisitions. . . . . The Legislature may undoubtedly declare all such surveys to be void; but no statute to this effect was in force in Virginia when this survey was made." The statute is directory and not mandatory. (Forbes v. Withers, 71 Texas, 306.) The statute is to be liberally construed with a view to effect its object and promote justice. (Sec. 3, Final Title, Texas Revised Statutes, p. 671.)

In Laffingwell v. Warren, 2 Black, 603, it was held, that "the construction given to a statute of the State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

In Ohio Life Insurance and Trust Company v. Debolt, 16 Howard, 416, the court say: "The sound and true rule is that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered by its courts of justice, its validity and obligation can not be impaired by any subsequent act of the Legislature of the State, or decision of its courts altering the construction of the law."

See also Pequa Bank v. Knopp, 16 Howard, 393.

And in Anderson v. Santa Anna, 116 U. S., 351, the Supreme Court of the United States again says: "If, ac-

cording to the law of Illinois, as declared by its highest court, at the time the bonds in suit were issued, the act of February 28, 1867, was a valid exercise of legislative power, the rights of the purchasers or holders could not be affected merely by subsequent change of decision. For it is the long established doctrine of this court—from which, as said recently in Green County v. Commr., 109 U. S., 105, we are not disposed to swerve—that where the liability of a municipal corporation upon negotiable securities depends upon a local statute, the rights of the parties are to be determined according to the law as declared by State courts at the time such securities were issued."

In Douglass v. County of Pike, 101 U. S., 677, the Chief Justice said: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of legislative enactment."

See also County of Ralls v. Douglass, 105 U. S., 727-732; Olcott v. Supervisors, 16 Wall., 678; City v. Lawson, 9 Wall., 477, 485; Boyd v. Alabama, 94 U. S., 645; Taylor v. Ypsilante, 105 U. S., 60, 71; Thompson v. Lee County, 3 Wall., 327, 330; Brown v. Mayor, 63 N. Y., 239, 244; Cooley's Const. Lim., 474, 477, fourth ed.; Dillon's Mun. Corp., sec. 46.

It is said by the Supreme Court of the United States, in Douglass v. Pike County, Book 25, Lawyers' ed., 100 U. S., 971: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts, and existing contract rights, that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a

statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effects on contracts as an amendment of the law by means of legislative enactment."

To the same effect is the case of Louisiana v. Pilsbury, 105 U. S., 295.

Eighth Assignment.

The Court of Civil Appeals erred in not holding upon all the facts found that the law embraced in article 3908, Revised Statutes of the State of Texas, as far as applicable to the issues of this case, was a continuation of the old law, as it was aforetime in Texas up to the adoption of said article 3908, and that tho adoption of said article was not the enactment of a new law, but merely a continuance of the old law, as it aforetime was.

Proposition.

There is no statute which required or authorized the court to change the rule in this case; for article 3908 of the Revised Statutes of Texas is but and only the continuing in force of the law as it existed theretofore.

Authorities.

Subdivision 8 of article 3908, Revised Statutes of Texas:

"The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same; and also that such survey was actually made in the field, and that the field notes have been duly recorded, given book and page."

The law as it existed theretofore:

§ 19. "The surveyors shall make oath before the respective Commissioners, truly and faithfully to discharge the duties of their office."

§ 20. "The course of the lines shall be determined by the magnetic needle, and care shall be taken to determine its variations from the pole in the district where the surveys are made."

§ 21. "The surveys shall be made with great caution, with metallic chains made for the purpose, and care shall be taken that the place of beginning the survey of each parcel of land be established with certainty, taking the bearing and distance of two permanent objects at least." (Sayles' Early Laws, vol. 1, p. 100.)

2nd. Stafford v. King, 30 Texas, 269; Sanborn v. Gunter, 84 Texas, 284, and other Texas cases, hold that it has always been contemplated and prescribed by the laws of Texas that the lines of surveys should be actually run and measured on the ground; and the Court of Civil Appeals so holds in this case, citing above authorities. (See opinion, p. 140.)

3rd. The report of the commission of codifiers relat-

ing to the Revised Civil Statutes of Texas, contains the following explanatory statements, which are of the utmost importance in arriving at the legislative intention in enacting article 3908, in so far as it contemplates and requires an actual survey on the ground.

Under Title 79, Public Lands, the commission say:

"The object being to collect under one general head all the laws now in force relating to the disposition and sale of the public domain, and which provide the mode and manner of acquiring titles to lands from the State, as distinguished from lands belonging to individuals, it seems more appropriate that the title should be 'The Public Lands.'

"The commission have left out all land laws which are now inoperative and which do not furnish a rule of action for the future, and also such as in their judgment ought to be repealed or superseded; and after revising and digesting the laws in force, have arranged the different subjects into twelve chapters, and, as near as may be, in their natural order.

"The material changes are very few, and the more important are here noted as follows:

"1. The different land certificates, which for the most part form the foundation of Texas land titles, are defined and classified, referring in the margin to the law under which they were issued. It furnishes in a condensed form the necessary information, and serves to explain what are the different land certificates which are required to be located within five years after April, 1876, and for which duplicates may issue in certain cases.

"2. It regulates the mode and manner of making entries and locations, and provides that no survey shall hereafter be made until after entry, etc. This will protect the *bona fide* locator against locations and surveys made in the field of which he could have no notice. It also provides for entries where part of the land lies in another land district.

"3. A pre-emption is a preference right to buy. A donation on condition of three years' residence, etc., is not a pre-emption. Chapter 8 provides for pre-emptions, and furnishes the mode by which a settler may enter 160

acres of land, and may have twelve months' time in which to pay for it, etc. We have followed in some respects the provisions of the United States Statutes relating to the same subject, and also relating to homestead donations, treated of in another chapter.

"4. We have also furnished more definite rules by which the settler may make entry upon the public domain, and after three years' residence obtain title to a homestead donation.

"5. The provisions of chapter 2, page 582, relating to Land reservations seems to be all that is necessary to retain on that subject.

"The work of the commission under this title was submitted to the Commissioner of the General Land Office for his examination and criticism, and we acknowledge our indebtedness to him for suggestions as to some of the amendments adopted." (See Sayles' Texas Civil Statutes, volume 2, pages 732–733.)

And under Final Title, General Provisions, page 739, volume 2, Sayles' Civil Statutes, the commission says: "Section 19 provides that the Revised Statutes, where substantially the same as the laws now in force, shall not be construed as repealing the latter or as new enactments thereof, but merely as a continuance of them."

And in closing the report, pages 940-941, volume 2, Sayles' Civil Statutes, the commission says: . . "We are under special obligations . . to the late Commissioner Groos, as well as his successor, Mr. Walsh. . . . Without their aid it would have been almost impossible to have prepared in so short a time the titles 'Archives,' 'County Boundaries,' 'Public Lands,' 'University, School and Asylum Lands.'

"Such as it is, we now submit the work to you to be laid before the legislature, whose duty it will be to examine and pass upon it. It will be their duty, because, under the constitution, they will become responsible for it, and become its authors if it goes into force.

"Still, while the constitution and laws make them responsible for the work, and require them to pass upon it, it must be borne in mind, that in the nature of things, the time to be devoted by them to that examination must

necessarily be short, and the examination itself, however carefully conducted, unavoidably very imperfect.

"The entire time of a session of the usual length would not suffice for the purpose. And when it is remembered that a great portion of the session must necessarily be consumed in carefully preparing the different and necessary appropriation bills, and in providing the ways and means for supplying deficiencies, and supplying funds necessary to meet the actual expenses of the government for the next ensuing two years, it will at once be seen that the examination of these bills can not possibly be as complete as it ought to be.

"Recognizing this to be the fact, we have endeavored to adhere, as nearly as possible, to the old law, so as to render less arduous the labor of examination. No great or radical changes, therefore, have been made, and no startling or strange innovations in our system have been introduced."

4th. Section 23 of the final title of the Revised Statutes of Texas, page 720, is also an authority in point, and shows that the legislature adopted the Revised Civil Statutes as reported by the codifiers without careful deliberation, and that the intention of the commission became the intention of the legislature.

"Section 23. Because this bill cannot be read in one day, or on three several days, an imperative public necessity exists requiring that the constitutional rule that the same be read on three several days should be suspended, and it is therefore suspended."

5th. Section 19 of the Revised Statutes of Texas, page 719, declares:

"That the provisions of the Revised Statutes, so far as they are substantially the same as the statutes of this State in force at the time when the Revised Statutes shall go into effect, or of the common law in force in this State at said time, shall be construed as continuations thereof, and not as new enactments of the same."

6th. Section 3 of the Final Title of the Revised Statutes of Texas, page 718, declares:

"Sec. 3. That the rule of the common law that stat-

utes in derogation thereof shall be strictly construed, shall have no application to the Revised Statutes, but the said statutes shall constitute the law of this State respecting the subjects to which they relate, and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice."

Remarks:

Article 3908, Revised Statutes, contains nine subdivisions, as follows:

"The field notes of every survey shall state:

"1. The county or land district in which the land is situated."

"2. The certificate or other authority under or by virtue of which it is made, giving a true description of same by numbers, date, where and when issued, name of original grantee and quantity."

"3. The land, by proper field notes, with the necessary calls and connections for identification (observing the Spanish measurement by varas)."

"4. A diagram of the survey; and,"

"5. The variation at which the running was made."

"6. It shall show the names of the chain carriers."

"7. It shall be dated and signed by the surveyor."

"8. The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same; and also that such survey was actually made in the field, and that the field notes have been duly recorded, giving book and page."

"9. When the survey has been made by a deputy, the county or district surveyor shall certify officially that he has examined the field notes, has found them correct, and that they are duly recorded, giving book and page of record."

The object of this whole article is to secure a definite survey of land, under official authority by virtue of a legal right, and to perpetuate the act; and when this has been accomplished the law is satisfied, and confirms the right acquired. No matter whether this has been done under article 3908—the law as it existed theretofore, under the

special provisions of the purchase act of 1879, or under the provisions of any other act.

The object and purpose of subdivision 2 of article 3908, is for identification of the certificate or other right by virtue of which the survey is made, and without which it could not be known by what authority the survey is made, or whether by any legal authority; and when the description is sufficiently full to identify the claim or right to land with certainty, the object of the subdivision is attained, though all of the directory requirements may not have been inserted for such identification. For instance, a description of the certificate by its number, quantity, and name of original grantee, would with certainty and definiteness identify the certificate, and such description would, to all intents and purposes, be a compliance with the spirit of the provision of law, notwithstanding the date of the certificate, when issued, and where issued, should be omitted.

Subdivision 3 of article 3908, is the *life and substance* of the entire article, and its object and purpose is to identify the land surveyed. *The land must be described by proper field notes, and the field notes must contain the necessary calls and connections for identification;* and when this is done in such way as to segregate the proper quantity of land, and give a description thereof by which it can subsequently be identified, the life of the article is preserved, the spirit of the law is obeyed, the object is attained, and the right thereunder is vested; no matter whether the actual work on the ground to obtain such description has been done by the surveyor who certifies the field notes, or by some other official surveyor whose work he had inspected and found to be correct, as in the case at bar. For after all, as said by Chief Justice Stayton in Thomson v. The Railway (68 Texas, 397), a legal survey is a description of land for its identification, rather than the actual work done by the surveyor to enable him to give such a description.

The object and purpose of subdivision 8 of article 3908 is to evidence officially and affirmatively the correctness of the survey, that it was made according to law, and that the survey was actually made in the field. Under former laws, the surveyor was required to certify the correctness of the survey. It has always been contemplated and required that the survey should be made according to law, and it was, and is, the universal custom of surveyors to so certify. It is not a disputed question that all laws in force prior to the Revised Statutes contemplated and required an actual survey on the ground. All prior decisions of the Supreme Court so hold, and it is so held in the opinion of the Court of Civil Appeals in this cause. The certificate of the surveyor required by this subdivision of article 3908, is merely a statement of fact—an evidence of what has been done—and if it be conceded that this provision for an official certificate, for evidence of what has been done, expressly contemplates and specifically requires an actual survey on the ground, still it must be admitted that it is merely and only the requirement of the law in force prior thereto, and is a continuance thereof, and not a new enactment with reference to actual surveys in the field. So, conceding that the official certificate here required contemplates an actual survey in the field, it does no more than an unbroken line of decisions by the Supreme Court holds was contemplated and required by all laws in force prior thereto. There is not even a dissenting opinion holding to the contrary.

The surveyors who made the surveys in controversy certified the correctness of the surveys, and that they were actually made in the field according to law, and this certificate is true in every essential particular. The surveys are substantially accurate and definite, they were actually made in the field, and they were well made. About this there is and can be no question, for there is no finding of the court which questions the substantial

accuracy of said surveys; but on the contrary, the court finds the surveys to be substantially correct, and also that they were actually made in the field by Elgin, and that Berry and Williams had, by their own work in the field, ascertained that the survey was so made; and the finding of the court is that it is one of the best surveyed blocks in that part of the State; and we submit that under such survey and contract the official record thereof, certified under the official oath and bond of the surveyors, who were the agents of the State, authorized and required to survey the land, authorized and required to make the contract, that a contract exists which the State of Texas can not, under the Constitution of the United States, impair.

Second Assignment:

The court of civil appeals erred in deciding that the said plaintiffs in error, E. M. Bacon and E. G. Graves, had not a valid contract with the State of Texas to purchase the said lands under the said acts of the legislature of Texas, approved July 14, 1879, and March 11, 1881, the obligation of which was impaired by the said State by the said acts of the legislature thereof, approved January 22, 1883.

Proposition:

If article 3908 be not the law and only the law as it existed theretofore, then it has no application to the surveys in controversy; because the purchase act of 1879 expressly provides, in its seventh section, for the survey of lands sold thereunder; and this provision was passed in contemplation of the then existing law, and of its uniform construction by all the departments of the State of Texas, and not in view of article 3908, which was not then the law, and which did not become the law until September 1st thereafter; and further, because the act of July 14, 1879, was passed by the 16th legislature, and the proviso to section 20 of the Final Title of the Revised Statutes expressly declares "that any law passed by the 16th legislature in conflict with any proviso of this act [the Revised Statutes], shall be the law of this State, this act [the Revised Statutes], to the contrary notwithstanding."

Authorities:

Those cited under assignments supra.

Certificate of the Secretary of State appended to the laws of the extra session of the Sixteenth Legislature of Texas, p. 53.

THE STATE OF TEXAS,
DEPARTMENT OF STATE.

I, John D. Templeton, Secretary of State of the State of Texas, do hereby certify that the laws contained in this volume are true and correct copies of the enrolled bills now on file in this department. I further certify that the special session of the Sixteenth Legislature convened at the city of Austin on the tenth day of June, A. D. 1879, and adjourned ou the ninth day of July, A. D. 1879.

[L. S.] In testimony whereof I hereto sign my name and affix the seal of the State of Texas, at Austin, on the twenty-fifth day of July, A. D. 1879. JOHN D. TEMPLETON,
Secretary of State.

Proviso to section 20, Final Title of the Revised Statutes of Texas, pp. 720, 721:

"Sec. 20. That no laws, general or special, enacted at the present session of the legislature, shall be in any way affected by the repealing clause of this title; provided, that any law passed by the 16th legislature, in conflict with any provision of this act, shall be the law of the State, this act to the contrary notwithstanding."

Section 22 of the Final Title of the Revised Statutes of Texas, p. 720:

"Sec. 22. That the Revised Statutes shall take effect and be in force at twelve o'clock meridian, on the 1st day of September, Anno Domini one thousand eight hundred and seventy-nine."

Section 11 of the act of July 14, 1879:

"Sec. 11. Whereas, the close of the present session of

the legislature is near at hand, an imperative public necessity exists that the constitutional rule requiring this bill to be read on three several days be suspended, and it is therefore so enacted; and whereas, the unappropriated lands of the State are being rapidly taken up, a public emergency exists that this act take effect from and after its passage, it is therefore so enacted.

Approved July 14, A. D., 1879.

Takes effect ninety days after adjournment."

Remarks:

The purchase act, approved July 14, 1879, was passed by the extra session of the 16th legislature, and article 3908 of the Revised Statutes did not take effect until September 1st thereafter. The purchase act contains the emergency clause, and had that act been passed as contemplated by a two-thirds vote, it would have gone into immediate effect upon its approval, July 14, 1879, long before September 1st, when article 3908 became operative; in which case that article could have had no application to surveys made under the purchase act, because article 3908 was not then the law. And if this article is in conflict with the purchase act the latter was the law, for the Revised Statutes so declare. Therefore, we submit that the surveys in controversy, as made for Bacon and Graves, were legal and valid surveys in contemplation of the law under which they purchased.

GENERAL SUMMARY.

What was the intent and purpose of the Act of July 14, 1879? And what would subserve the best interests of the State?

That the act was an immediate and pressing necessity of government is manifest from the Governor's proclamation convening the legislature in extra session. The object and purposes of the act as gathered therefrom

was to secure money by selling public lands to pay the bonded debt of $5,500,000, the annual interest thereon of $400,000, and for the maintenance of the public schools of the State, and thereby relieve the people from the burdens of taxation. The Governor says: "I have good reason to believe that upon extensive publications being made to let it be known, great quantities of land can be rapidly sold, and that it will be the best and fastest way to settle the country with a good population. I deem this a matter of great importance to the public interest in many respects, but especially as it looks to a more speedy closing up of the interest that the State has in lands, and will relieve the people from taxes in proportion to the lands sold."

The intent and purposes of the act, as gathered from the law itself, seem to be that indicated in the Governor's proclamation and message. The main object was to raise money, one half to be devoted to the payment of the public debt and the other half to the maintenance of the public schools. That this was the primary and leading intent is indicated by the short period within which the money should be paid into the treasury after application. That the raising of money quickly was the main intent and purpose is indicated by the fact that there was no limit as to acreage of land which any purchaser might buy, and still further by the fact that corporations and firms, as well as individuals, were authorized to purchase land to the full extent of their desire and ability.

We submit that, such being the intent and purpose of the act, the best interests of the State demanded that a liberal construction should be given to the act and all laws upon the subject.

The contract sought to be enforced in this case was made in full compliance with the letter and the spirit of the law, and in every essential particular was regular; but if not in strict technical conformity to law, we submit that as made and com-

pleted by plaintiffs in good faith, it was approved, confirmed and ratified by the State of Texas.

1. The Land Commissioner, who was required by the act to instruct the surveyors generally and specifically as to surveying this land, received and filed the field notes in his office, and took the filing fees for the benefit of the State, and thus he approved the surveys as made and returned; and while the dates of the surveys showed conclusively how they were made, the Commissioner raised no objection thereto on any account.

2. The Treasurer took the purchase money under direction of the Attorney-General of the State; and under the same advice, executed his receipt therefor in the usual form, acknowledging the same to be in full payment for this land, under the act; thus the Treasurer and Attorney-General of Texas approved and confirmed the contract.

3. The then Attorney-General Hogg, who advised the Treasurer to take the money and to issue the receipts in full payment for the land, within a few days thereafter became the Governor of the State, and under section 10 of the act he directed the Comptroller of Public Accounts to invest said purchase money in interest-bearing bonds of the State or of the United States (see sec. 10, act 1879), and the money was so invested under the Governor's direction, for Treasurer Wortham says (Record, p. 59) the money was mingled with other funds of the State and paid out on the warrants of the Comptroller in accordance with law; and thus the Governor of Texas, the Comptroller of Texas, and a second Treasurer of Texas approved and confirmed the contract for the sale of this land.

And notwithstanding the contract was so made under official authority, completed by plaintiffs, and approved and confirmed by the Land Commissioner, by the Attorney-General, by the Comptroller, by two Treasurers, and

by the Governor of Texas, still the State of Texas says there was no contract; and, under the laws and the authority of said State, held by its courts to be valid, plaintiff's contract has been impaired, the land has been recovered, and the purchase money retained.

While we have not copied into the brief all the assignments, we have tried to evoke the principal of them all; but if we have failed to do so, we do not intend or desire to waive or abandon any of the assignments that can be considered to the advantage of plaintiffs in error.

We respectfully submit the case.

CHAS. W. OGDEN,
WM. M. WALTON,
JNO. W. MADDOX,
Attorneys for plaintiffs in error. Bacon and Graves.

APPENDIX.

CHAPTER LII.—An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That all the vacant and unappropriated land situated in the following named counties, viz., Nolan, Mitchell, Howard, Martin, Andrews, Gaines, Davidson, [Dawson?], Borden, Scurry, Fisher, Stonewall, Kent, Garza, Lynn, Terry, Yoakum, Cochran, Hockley, Lubbock, Crosby, Dickens, King, Cottle, Motley, Floyd, Hale, Lamb, Bailey, Parmer, Castro, Swisher, Briscoe, Hall, Childress, Collingsworth, Donley, Armstrong, Randall, Deaf Smith, Oldham, Potter, Cordova, Gray, Wheeler, Hemphill, Roberts, Hutchins, Moore, Hartley, Davidson, [Dawson], Sherman, Hansford, Ochiltree and Lipscomb be and the same is hereby appropriated and set apart for sale, together with all the unappropriated lands situated and being within and included in the Pacific reservation, and together with such separate tracts of unappropriated public land, situated in organized counties in this State, as contain not more than six hundred and forty acres; *provided,* that the three millions and fifty thousand acres, hereto-

fore apropriated for the building of a State capitol, shall have a preference right of location in the counties heretofore reserved for that purpose. The provisions of this act shall not be so construed as to prohibit the right of pre-empting within the bounds of the reservation here made; but any party shall have the same right of acquiring a homestead, within this reservation, under the preemption laws of this State, as he may have had prior to the passage of this act.

SEC. 2. That any person, firm or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm or corporation desire to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

SEC. 3. It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey, to certify to, record and map the field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the General Land Office, as required by law in other cases.

SEC. 4. Surveyors shall be entitled to receive from applicants for the purchase of lands under the authority of this act, all legal surveyor's fees for work done by them.

SEC. 5. Within sixty days after the return to and filing in the General Land Office of the surveyor's certificate, map, and field notes of the land desired to be purchased, it shall be the right of the person, firm or corporation, who has had the same surveyed, to pay or cause to be paid into the Treasury of the State the purchase money therefor, at the rate of fifty cents per acre, and upon the presentation to the Commissioner of the General Land Office of the receipt of the State Treasurer for such purchase money, said Commissioner shall issue to said person, firm or corporation, a patent for the tract or tracts of land so surveyed and paid for.

SEC. 6. No tract of land shall be sold under the provisions of this act that contains more than six hundred and forty acres, and no tract shall have a greater frontage on any running stream, or permanent water, than one

vara per acre for each survey of three hundred and twenty acres or less, and three-fourths of one vara per acre for all other surveys.

SEC. 7. It shall be the duty of the Commissioner of the General Land Office, to give such general and specific instructions to surveyors in relation to the surveying of the public lands, under the provisions of this act, as may best subserve the interest of the State, and carry into force and effect the intent and purposes of this act.

SEC. 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file and location shall be utterly null and void.

SEC. 9. Should any applicant for the purchase of public land fail, refuse or neglect to pay for the same, at the rate of fifty cents per acre, within the time prescribed in section 5 of this act, he shall forfeit all rights thereto, and shall not thereafter be allowed to purchase the same, but the land so surveyed may be sold by the Commissioner of the General Land Office to any other person, firm or corporation, who shall pay into the treasury the purchase money therefor.

SEC. 10. One-half of the net proceeds of sale under the provisions of this act, shall be and are hereby set apart for the benefit of the public free schools of this State, and the Comptroller of Public Accounts shall, under and by direction of the Governor, invest the same in interest-bearing bonds of the State of Texas, or if said bonds are not to be obtained, then in interest-bearing bonds of the United States, the interest therefrom to be paid into the treasury as part of the available school fund. The balance of the net proceeds of sale under the provisions of this act shall be applied by the proper authorities to the payment and extinguishment of the bonded debt of the State of Texas as the same becomes due and payable. No surveys shall be made in any of the counties set aside for the State Capitol, and in which said lands may be selected, until after the survey of the three million and fifty thousand acres set aside for the construction of a new State Capitol have been surveyed.

SEC. 11. Whereas, the close of the present session of the legislature is near at hand, an imperative public necessity exists that the constitutional rule requiring this

bill to be read on three several days be suspended, and it is therefore enacted; and whereas, the unappropriated lands of the State are being rapidly taken up, a public emergency exists that this act take effect from and after its passage, it is therefore so enacted.

Approved July 14, A. D. 1879.

Takes effect ninety days after adjournment.

The act of July 14, 1879, was amended by an act approved March 11, 1881; but not in any way pertinent hereto.

The Legislature of Texas passed the following act, which was approved January 23, 1883, at 1:30 p. m.:

CHAPTER III.—An Act entitled An act to withdraw the public lands of the State of Texas from sale.

SECTION 1. Be it enacted by the Legislature of the State of Texas: That all the public lands heretofore authorized to be sold, under the act entitled "An Act to provide for the sale of the unappropriated public land of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, be and the same is hereby withdrawn from sale: *provided*, that nothing contained in this act shall be construed to return the land reserved by an act entitled "An Act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, and the act amendatory of such act, approved March 11, 1881, to the mass of the public domain, but the same shall be construed to be reserved for the purposes for which said land was originally set apart and designated by said act, until the legislature shall otherwise provide.

SEC. 2. Whereas, these lands are being daily sold, to the great detriment of the State, an imperative public necessity exists for the immediate passage of this act, and that the constitutional rule requiring bills to be read on three several days be suspended and this bill take effect from and after its passage, and it is so enacted.

Approved January 22, at one o'clock and thirty minutes, 1883.

Takes effect from and after its passage.

Office Supreme Court U.S.
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Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 296.

E. M. BACON, E. C. GRAVES, AND C. C. GIBBS, TRUSTEE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

Supplement to the Briefs for the Plaintiffs in Error.

J. HUBLEY ASHTON,
THOMAS D. COBBS,
Counsel for C. C. Gibbs, Trustee.
WM. M. WALTON,
Counsel for Bacon and Graves.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

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Supplement to the Briefs for the Plaintiffs in Error.

I.

The case of Louisiana vs. Pilsbury (105 U. S., 278), *cited in the Brief for C. C. Gibbs, trustee, page* 30.

Counsel desire to refer, in connection with that case, to the opinion of the supreme court of Louisiana, which shows that the State court *declined to pass upon the validity of the Louisiana act of March 6, 1876, prohibiting the levying of the tax stipulated in the act of 1852 to pay the interest on the bonds*

and taking away from the bondholders the means of enforcing payment in existence when the debt was contracted.

The opinion is reported in *State ex rel. Southern Bank vs. Pilsbury, Mayor, et al.* (31 La. Ann., 1, 22). The supreme court of Louisiana, by Marr, J., said:

"We do not find it necessary to pass upon this act, because the views which we have already expressed [that the act of 1852 authorizing the bonds was unconstitutional] suffice to dispose of this case, and we prefer to reserve any expression of opinion as to the validity of the act, in whole or in part, until the question shall be presented to us in such shape and between such parties as will give us jurisdiction. Without reference to this act, the relator is not entitled to the relief which he seeks, and that is the only matter to be determined on this appeal."

II.

The construction of article 3908 of the Revised Statutes of Texas.

The pertinent rule of construction is stated by Spencer, J., in *Taylor vs. Delancy* (2 Caines's Cases, N. Y., 149), discussing the revision of 1801, as follows:

"Where the law antecedently to the revision was settled, either by clear expressions in the statutes or adjudications on them, the mere change in phraseology shall not be deemed or considered a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change."

This principle was afterwards recognized by Kent, Ch. J., in the *Case of Yates* (4 John., 318, 359), as follows:

"The act of 1787 follows the *English* statutes *verbatim*, and the revised act of 1807 made only some slight abbreviations in the mode of expression, which cannot without violence be construed to alter in the least degree the sense and settled construction of the former act. That the "mere change of phraseology" in the revised laws was not to work

a change in the established interpretation was the unanimous decision of the court for the correction of errors, in 1805, in the case of *Taylor vs. Delancy* (2 Caines's Cases in, Error, 150, 151)."

The rule was expressly recognized and affirmed by the supreme court of Texas in *Ennis vs. Crump* (6 Texas, 341) decided in 1851, where that court, by Wheeler, J., said:

"This statute was not intended, we think, to change the rule upon this subject, *as understood and practised under the former law.* That the mere change of phraseology in the revision of a statute before in force will not work a change in the law previously declared, *unless it indisputably appear that such was the intention of the legislature*, has been expressly decided (2 Cain. Cas. Er., 143; 4 Johns. R., 317–359; 21 Wend. R., 316; 2 Hill, 380). No such intention is manifested in the present instance."

The principle invoked is stated upon the authority of the cases above cited by Mr. Endlich in his valuable *Commentaries on the Interpretation of Statutes*, § 381, as follows:

"The importance of the principle which attaches slight weight to mere change of phraseology is particularly manifest in the construction of statutes that are substantially reenactments or that are intended as revisions or consolidations. As to such enactments it is well settled in this country that in the absence of an intention to change the law sufficiently clearly appearing from other guides of interpretation, or unless the change is such as, in itself, to render such an intention *manifest and certain*, mere variations in the language of such enactments from the language of former statutes on the same subject, under which the law has become settled, will not be regarded as intended to call for a different construction."

J. HUBLEY ASHTON,
THOMAS D. COBBS,
Counsel for C. C. Gibbs, Trustee.
WM. M. WALTON,
Counsel for Bacon and Graves.

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In the Supreme Court of the United States.

Spring Term, 1896.

E. M. BACON, E. G. GRAVES AND C. C. GIBBS, TRUSTEE, PLAINTIFFS IN ERROR,

No. 296. VS.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

M. M. CRANE, ATT'Y GEN'L.
Att'y for The State of Texas.

[15,448.]

In the Supreme Court of the United States.

Spring Term, 1896.

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[15,448.]

Not having been furnished with a copy of the brief of counsel representing plaintiffs in error, and therefore having no opportunity to judge of the correctness or incorrectness of their statement of the case, I beg to submit the following:

This case was instituted by the State of Texas, through her then Attorney-General, in 1891. The petition was amended on November 27th, 1891. (Record, p. 2.) It was what is known in Texas as a suit of trespass to try title for several tracts or parcels of land in the counties of Scurry, Borden, Fisher, Kent and Howard, in the State of Texas, described substantially as follows:

Beginning at the northeast corner of survey No 170, block No. 25, Houston & Texas Central Railroad Company; thence west 13 miles; thence north 10 miles and 1,727 varas to the northeast corner of survey No. 1, block No. 29, township 5, North, Texas & Pacific Railroad Company; thence north 77 degrees east with the north line of the Texas & Pacific 80 miles reservation 28 miles; thence east 7 miles; thence south 3 miles to the southwest corner of survey No. 59, block K, T. A. Thomson; thence east 5 miles to the southeast corner of survey No. 55, block K; thence south 2,700 varas to the northeast corner of survey No. 247, block 2, Houston & Texas Central Railroad Company; thence south 75 degrees west 2 miles to the northeast corner of survey No. 251; thence north 15 degrees west 1 mile to the northeast corner of survey No. 276; thence south 75 degrees west 9 miles to the northwest corner of survey No. 269; thence south 15 degrees east 4½ miles with the west line of block 2; thence south 2 miles: thence west 6 miles; thence south 21 miles; thence west 9 miles to the east line of the Lavaca Navigation Company surveys; thence north 14 miles to the place of beginning. Containing about 550 sections.

Defendants filed an answer containing demurrers, general and special, a general denial, and a special plea in substance that they were citizens of Texas. That the legislature of their State, by an act passed on the 14th of July, 1879, and an act amendatory thereof passed on the 11th of March, 1881, offered for sale and proposed to sell to its citizens and to others its public domain comprised and contained

within the certain counties named in said acts, at the rate of fifty cents per acre, for the purpose of paying the public debt of the State and for other purposes therein named. That the defendants complied with the provisions of the acts named, and about the 1st day of December, 1882, while said statutes were still in force, had had the lands surveyed in accordance therewith, applying for the purchase of same. That the surveyor to whom they applied received and approved and filed their application, etc. That the land was properly surveyed in January, 1883, by that surveyor and his authorized deputies, as was his duty to do. That about the 17th and 20th days of March he returned the field notes so made to the General Land Office of the State as required by law; and that they also paid all the fees due as required by law to be paid thereon to the land office. They therefore alleged that they had performed all of the requirements of the acts to entitle them to become the purchasers of the lands so surveyed. That on or about the 19th of May, 1883, within the time prescribed by the statutes, they presented to the treasurer the certificate of the Commissioner of the General Land Office showing the facts above recited, that they had paid all of the fees, charges, etc., and offered and tendered to the treasurer the full amount of the money necessary to pay the State for all of the said lands, at the rate of fifty cents per acre, as the same had been surveyed and the field notes thereof returned to the land office as aforesaid into sections of 640 acres each, as required and provided by law.

They further stated that the treasurer refused to receive the money so tendered. That they at all times stood ready to pay same, but the treasurer persistently refused to receive it until the 31st of January, 1891, when they paid into the treasury for the following designated sections of land containing 640 aces each, to-wit: Sections 1 to 117, both inclusive, in block B; and sections 1 to 291, both inclusive, in block G, and sections 1 to 58, inclusive, in block M, being a part of the lands sued for by the State, lying and being situated in the counties of Scurry and Borden.

It was further alleged that the defendants paid to the State Treasurer then and there, and the same was received by him, the sum of $149,120 for and in purchase of 298,248 acres of land, being a part of the land sued for, and designated and described in plaintiffs' petition by the numbers of the sections and the blocks designated by the letters B, G and M. That thereupon the treasurer of the State executed and delivered to these defendants a receipt for said money.

The defendants then expressly and specifically disclaimed as to any and all right, title or interest in or to all the other lands described and sued for in plaintiff's petition other than those hereinbefore mentioned. They alleged that the officers in the land office of the State had neglected and failed to delineate and define upon the maps of the land office the lands claimed as properly belonging to defendants, by reason of which defendants were unable to furnish the court with a more definite description of their lands. They insisted that the

State had since disposed of a portion of said land through its General Land Office, and has assumed and exercised control over the same. That the State Treasurer has accepted the proffered money of the defendants paid for said lands by distributing it to the general revenue, the public school fund, and other purposes of the State.

They further complain because the State did not offer to refund said money, although claiming title to the lands so purchased. They further claimed to have a vested right in the lands, which would be violated if the plaintiff should be permitted to recover. They specifically pleaded article 2, section 10, subdivision 1, of the Constitution of the United States. They then prayed for judgment, etc. (Record, pp. 4–7.)

It was claimed by the State that at the time the money was received, if it was received, for said lands, that the plaintiffs in error were notified that their right to the land would be contested notwithstanding the receipt of the money. That they were not misled thereby, but acted with full knowledge of the claims that the State might then have that they had no title and could acquire none to the land in the manner stated.

The case was tried. The demurrers of the defendants—plaintiffs in error here—were overruled, and judgment was rendered for the State of Texas for the land in controversy.

The court tried the case without the intervention of a jury, and under the practice recognized in Texas, filed its conclusions of fact and its conclusions of law therein. They are as follows:

"1. On December 1, 1882, E. M. Bacon and E. G. Graves made application to Joel McKee, who was then the surveyor of the Palo Pinto land district, as such surveyor to purchase the land in controversy under what is known as the fifty-cent act, approved July 14, 1879, and amended March 11, 1881, which said application was received and recorded by said surveyor on said day.

2. The land so applied for was situated at the time of application in the Palo Pinto land district, and the said surveyor was the proper officer to whom application for the purchase of the same should have been made.

3. Bacon and Graves paid the fees for filing the field notes in the general land office entirely within the time required by law.

4. By the records of the land office the 117 sections of land of block "B" of the alleged Bacon and Graves survey purport to have been surveyed by H. M. Berry, deputy surveyor, on January 17, 18 and 19, 1883, that said field notes of said sections were recorded in the surveyor's office on the 14th and 18th of March, 1883; that said field notes were returned to the general land office March 17, 1883, and the chain carriers who purport to have assisted said Berry in making said survey are J. H. Miller, J. B. Pierce, Andy Burns, Ed. Wagner and H. C. Reed.

5. By the records of the land office ninety-one sections of land of block "G" of the alleged Bacon and Graves survey purport to have been surveyed by H.M.Berry, dep. surveyor on the 18th, 19th, 20th and 22d days of Jan'y, 1883, the field notes thereof

were recorded in the surveyor's office on March 14 and 15, 1883, and were returned to the general land office on March 17 and 20, 1883.

6. By the records of the land office the remaining 200 sections of block "G" of said survey purport to have been surveyed by E. A. Williams, deputy surveyor, on January 17, 18, 19, 20, 1883. The field notes thereof were recorded in the surveyor's office on March 14 and 15, 1883, and were returned to the general land office March 17 and 20, 1883.

7. By the records of the land office twenty-five sections of block "M" of said survey purport to have been surveyed by H. M. Berry, dep. surveyor, on January 22, 1883. Field notes duly recorded in surveyor's office March 14 and 15, 1883, and returned to the general land office March 20, 1883, except the field notes of sections 26. 27, 28, 29, 30, 31 and 32 of said block "M," which were never returned to the general land office.

8. By the records of the land office the remaining 94 sections of said block "M," purport to have been surveyed by E. A. Williams, deputy surveyor, on January 20, 21, 22 and 23, 1883, the field notes thereof were recorded in the surveyor's office March 14, 16 and 17, 1883, and returned to the general land office March 20, 1883.

9. That by the records of the land office sections 33 to 68, inclusive of block "M." purport to have been surveyed by E. A. Williams, on January 21, 1883.

January 21, 1883, was on Sunday.

10. By the records of the land office sections 251

to 291, inclusive of block "G," and sections 1 to 25, inclusive of block "M," and section 115 of block "M" purport to have been surveyed on January 22, 1883, and by the records of said office sections 99 to 114 inclusive. and sections 116 to 126, inclusive of block "M," and sections 1 to 12, inclusive of block "N," which latter are in block 27, H. & T. C. survey, purport to have been surveyed January 23, 1883.

11. By the records of the land office sections 1 to 12, inclusive of block "N," purport to have been surveyed by H. M. Berry on January 23, 1883, the field notes were recorded in the surveyor's office March 14 and 16, 1883, and were returned to the general land office March 20, 1883; that sections 13 to 27, inclusive of said block "N," also section 41, 42 and 47 purport to have been surveyed by Benj. Boydston on January 20, 1883, and field notes returned to the land office March 20, 1883.

12. By the records of the land office sections 28 to 40 inclusive, sections 43 to 46 inclusive, and sections 48 to 52, inclusive of block "N," purport to have been surveyed by Benj. Boydston on January 21, 1883, and field notes returned to the land office March 20, 1883.

13. The surveyor of Palo Pinto land district certified to the respective surveys hereinbefore mentioned on the days said surveys purport to have been made.

14. None of the land included in this suit has ever been patented by the State under the Bacon & Graves purchase, and on the 26th day of May, 1890, Bacon & Graves transferred by deed of spe-

cial warranty 579 sections of land to C. C. Gibbs, who holds the same as trustee for E. M. Bacon and E. G. Graves and others.

15. I further find as a matter of fact that none of the land in suit was actually surveyed upon the ground by the deputy surveyors, who purported to have done so, but they merely copied in the office of the surveyor of the Palo Pinto land district the field notes of the 'Elgin survey.' "

In July, 1873, the Houston and Texas Central Railway Company located certificates in Scurry, Borden, Howard, Kent and Fisher counties on lands known as blocks 27 and 97 of the Houston & Texas Central Railway Company survey, including that sued for herein, which said block 97 comprises surveys from 1 to 955, all of which were by virtue of land certificates issued to said company by the commissioner of the general land office of the State of Texas, and the field notes thereof bear date "July, 1873," and were returned in the surveyor's office during the month of ——, 1873, and were filed in the general land office November 20 and 26, 1873, and all the lands in this suit were and are within the Texas & Pacific railway 80-mile reservation marked by the act of the legislature passed May 2, 1873.

The above survey is the "Elgin survey," the field notes of which were adopted by the surveyor of Palo Pinto land district and his deputies in making out the field notes of the land applied to be purchased by Bacon & Graves.

Blocks 97 and 27 were actually surveyed on the ground by Elgin in the manner in which it has

been customary by surveyors in Texas to survey large bodies of land, that is, by running the outside boundary lines of the blocks, or a part of them, putting up permanent landmarks, and leaving the interior lines without running. These blocks, in writing up field notes, were divided into 640-acre surveys, and the interior surveys were made without actually running the lines, and Elgin did not run all the lines of any section in blocks 27 and 97, unless, as he says, it was done by accident.

The field notes of said blocks 27 and 97 have remained on file in the general land office since they were filed therein, and said lands are platted on the maps of said office. There are 33,280 acres of land in block 27, 611,000 acres in block 97.

16. Deputy Surveyors Berry and Williams had, prior to the adoption of the field notes for Bacon & Graves, run lines and ascertained corners in blocks 27 and 97, and found them to be as correct as any work of that character in that part of the State, and were satisfied as to the substantial accuracy of said surveys.

Said surveys, as far as marked lines and corners are concerned, and in accuracy of work, were equal to or better than any other surveying in that part of the State, except that done for the Texas & Pacific railway, which was unusually accurate.

17. In December, 1882, and in January, February and March, 1883, Joel McKee was the surveyor of the Palo Pinto land district, and E. A. Williams and H. M. Berry were deputy surveyors under him.

18. I find that at the time E. G. Graves entered into the agreement with E. M. Bacon to purchase

these lands, to-wit: On the 29th and 30th of November, 1882, ——— was an employe in the general land office at Austin as draftsman, and that he drew his salary for the entire month of November, 1882, as well as for the preceding ten months.

19. Bacon and Graves have neither paid nor offered to pay taxes on said land nor any part thereof at any time, nor have they rendered any part of said land for taxes for any year except for 1891, when it was rendered by C. C. Gibbs, trustee.

20. Bacon and Graves, at the time of the application by them to purchase said lands, were not responsible parties, being worth less than $3000 each, and had made no arrangements to procure more than enough money to pay for the filing, etc , of the field notes, and afterwards, in February or March, 1883, the promise of a loan of $5000.

22. The Colorado river is one of the great rivers of the State. It runs through about twenty sections of block 97.

It is not a navigable stream where it flows through said block, but it is permanent water.

23. The Elgin survey of block 97, adopted by the deputy surveyors, Williams and Berry, is not made in conformity to the 50-cent act of 1879, and its amendment in 1881, as the surveys made on the Colorado river, which is permanent water, cross the same and have a greater frontage thereon than one-half the square of such survey; and that, too, where they are not surrounded by older surveys.

24. On the 16th May, 1883, Bacon and Graves tendered to the treasurer of the State $80,640, and on May 19th, 1883, tendered to said treasurer the

further sum of $104,640 in payment of surveys Nos. 118 to 291 inclusive, block "G," in Borden and Scurry counties; surveys Nos. 1 to 119 inclusive, block "M," Scurry county; surveys Nos. 1 to 52, inclusive, block "N," Scurry county; surveys 1 to 117 inclusive, block "B," Scurry county, and surveys 1 to 135 inclusive, block "G," Borden and Scurry counties, which said tenders were refused and declined by the said treasurer. In January, 1891, Bacon and Graves paid to said treasurer on said lands $149,320, which was received by him under protest.

24. In December, 1882, the land in controversy was worth one dollar per acre. At present it is worth two dollars per acre for dry land and three dollars per acre for watered land.

From the foregoing facts I conclude that the plaintiff, the State of Texas, is entitled to recover in this suit on each of the following grounds, to-wit:

1. Bacon and Graves were not responsible parties at the time they applied to purchase the land, and could not purchase under the law.

2. They did not comply with the law by having the land surveyed, as was required by law, and therefore could not purchase it.

3. The survey as adopted was not made in accordance with law—is incorrect, totally so—in having a greater frontage on water than is permitted under the acts of 1879 and 1881.

4. Bacon and Graves have never paid or offered to pay for said land until long after the expiration of the time allowed and required by law. The pur-

ported surveys of many of the sections of land for which they tendered payment on May 19, 1883, were made after the 50-cent act was repealed, and Bacon and Graves did not separate or offer to separate in their tender the surveys made before the repeal from those made after, and there was consequently no legal tender.

5. At the time Graves entered into an agreement with Bacon to purchase these lands he was an employe of the general land office, and his action was against the civil and criminal laws of the State.

6. I further hold that the State is not bound to return the money paid in January, 1891, to entitle it to a judgment for the land.

From the judgment so rendered the plaintiffs in error appealed the case to our Court of Civil Appeals. (Bacon & Graves vs. The State, 2 Ct. Civ. App., Tex., 692.)

The Court of Civil Appeals, in passing on the question, said: "We adopt the findings of fact filed by the court below, except from finding No. 20, strike out the words 'were not responsible parties,' and add to finding No. 23 the following: 'By the word 'protest', as used in the finding, is meant that the treasurer of the State had several times refused to accept this money; and at the time he received it, in January, 1891, the parties paying fully understood that the State would contest their claim to this land; and the treasurer did not receive the money as a legal payment therefor." (1 Ct. Civ. App., Tex., 707.)

It will be noted that the plaintiffs in error

based their claim to the land in controversy upon the fact that the State of Texas, through its legislature, had passed a statute authorizing the purchase of the land for the price of fifty cents per acre, requiring the purchaser to make an application therefor according to certain prescribed forms, and to have the land surveyed; and that they fully complied with all this, in that they had made the required application, had had the land surveyed in accordance with the terms of the statute, and had tendered the purchase price to the treasurer. That therefore the contract was complete, and the right to the land vested, and that the State should not recover it.

Some objection was made to the form of the petition filed by the State. Upon these preliminary questions it is sufficient to state that the petition was in form many times approved by our State Supreme Court. (State vs. Delesdenier, 7 Tex., 76; State vs. Kroner, 2 Tex., 492; Day Land and Cattle Co. vs. The State, 68 Tex., 535.)

As to the failure of the State to tender the purchase money back which its officers had received, our courts have held that a tender by the State is unnecessary. (The State vs. Snyder, 66 Tex., 687; State vs. Thompson, 64 Tex., 690; State vs. Rhomberg, 69 Tex., 220; Randolph vs. The State, 73 Tex., 485.)

The decisions quoted are based upon two grounds, one of which is sufficient to state: In addition to this being an action at law, it is an action by the State, and the presumption must be always indulged that the State will treat its citizens

justly and fairly, and that if the land is recovered the money will be returned.

In any event, being a controversy between the State and a citizen of the State, they must be controlled by the laws of Texas, as interpreted by its Supreme Court, when the subject matter of the controversy is reatly situated entirely within its borders.

The contention of the State of Texas in this case in all the courts has been that the plaintiffs in error did not make the survey as the statute required, and that, therefore, they had not complied with the contract. The requisites of the survey are stated by Article 3908 of the Revised Statutes of Texas of 1879. (Sayles' Digest, Vol. 2, p. 329.)

It reads as follows:

"Art. 3908. The field notes of every survey shall state—

1. The county or land district in which the land is situated.

2. The certificate or other authority under or by virtue of which it is made, giving a true description of same by numbers, date, when and where issued, name of original grantee and quantity.

3. The land, by proper field notes, with the necessary calls for identification (observing the Spanish measurement by varas.)

4. A diagram of the survey; and

5. The variation at which the running was made.

6. It shall show the names of the chain carriers.

7. It shall be dated and signed by the surveyor.

8. The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same; and also that such survey was actually made in the field, and that the field notes have been duly recorded, giving book and page.

9. When the survey has been made by a deputy the county or district surveyor shall certify officially that he has examined the field notes, and has found them correct, and that they are duly recorded, giving book and page of record."

It will, of course, be noted that the language of the statute requires the certificate to show that such survey *was actually made in the field.* The record in this crse shows that there was no survey made by the plaintiffs in error in the field. On the contrary, it shows affirmatively that they copied from the records of an old invalid survey previously made, and one not made on the grounds. (Record, 36.)

The language of the surveyor who is accredited with doing part of the work is as follows: "I did not in 1883 make a survey on the ground of 116 sections of 74,240 acres of land in Block B; 89 sections, of 56,960 acres of land in Block G; 25 sections, of 16,000 acres of land, in Block M; 12 sections, of 7,680 acres of land, in Block N; all in the alleged Bacon and Graves survey. I only adopted the field notes from the records in the office. I made the certificate to each set of field notes as I adopted them." (Record, 36.) "I did not," said he,

"do any surveying on the ground for E. M. Bacon or E. G. Graves. I only adopted for them the work that had already been done"

The other surveyor, E. A. Williams, said: "It is a fact that I adopted the original H. & T. C. R. R. survey while at the same time I had my own data at hand.....I adopted the field notes from data at hand. It would require about 30 days going 350 or 400 miles, to survey 198,480 acres of land on the ground, about 12 miles per day. I was on the land prior to the Bacon and Graves in 1882 or 1883." Being asked this question, "Is it not true that when none of the lines of the sections had been run on the ground by you, you simply copied the field notes of the H. & T. C. R'y. survey, without verification, for Bacon and Graves, and certified that you had surveyed them?" "Yes," said he, "if there were any such sections."

It was substantially shown, in other words, that there was no actual survey of the land made on the ground. The district court trying the case so found. The Court of Civil Appeals also approved that finding. The evidence above quoted indicated that the finding was correct; but whether correct or not, under our decisions they are conclusive as to the facts. It is provided by act of the legislature creating the Court of Civil Appeals that the judgment of that court shall be conclusive as to the facts of a case. Mutual Life Insurance Co. vs. Haywood, 88 Tex,, bottom of p. 321 and p. 322. That the law required an actual survey our Supreme Court of the State has determined. Sanborn vs. Gunter, 84 Texas, 248, 290;

Jumbo Cattle Co. vs. Bacon & Graves, 79 Tex., 5; White vs. Martin, 66 Tex., 340; Land Co. vs. Thompson, 83 Tex., 169.

The contrary contention of the plaintiffs in error is based upon the decisions of the Supreme Court of Texas rendered before the enactment of the Revised Code of 1879. But it is not any longer an open question in this court; this court has determined it in favor of the contention here made, Campbell vs. Wade, 132, U. S., 34,

In the case last quoted the court, speaking through Mr. Justice Field, said: "By the express terms of the act it was only after the return and filing in the General Land Office of the surveyor's certificate, map, and field notes of the survey that the applicant acquired the right to purchase the land by paying the purchase money within sixty days thereafter. But for this declaration of the act, we might doubt whether the right to purchase could be considered as conferred by a mere survey so as to bind the State. *Clearly there was no such right in advance of a survey,*" 132, U. S., 37. The court added: "In the present case before the act withdrawing the lands from sale, which was equivalent to a repeal of the act authorizing the sale, could be held to impair any vested right of an applicant, he must have done everything required by the law to secure such right. Until then, no contract could arise in any way binding upon the State. No contract rights of the petitioner were therefore violated by its legislature."

This court reaffirmed the doctrine there announced in the case of Count Joseph Tellfner vs.

Russ. The opinion was delivered on March 30, 1896, and has not yet been published.

In speaking of the field notes returned, the Supreme Court, on page 7 of the opinion delivered said: "There are objections to recognizing that the field notes to such a large tract (1813 sections) were filed before the expiration of three months They were of no validity if not made on the ground, and it is not shown that they were made or could be made in any other way." The distinguished jurist then quoted the case of Bacon and Graves vs. The State, 79 Texas, 79, to show what was meant by the terms "to be surveyed;" and to show further that the field notes copied from a prior survey on file in the office does not constitute a survey as the statute requires.

The case last cited effectually settles the questions involved herein. It is therefore respectfully submitted that the case should be in all things affirmed,

M. M. CRANE, ATT'Y GEN'L.
Att'y for The State of Texas.

Office Supreme Court U. S.
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JAMES H. MCKENNEY,
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Supreme Court of the United States.

OCTOBER TERM, 1895.

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vs.

THE STATE OF TEXAS.

SUPPLEMENTAL BRIEF FOR THE DEFENDANT IN ERROR.

M. M. CRANE,
Attorney General of Texas.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 296.

E. M. BACON, E. G. GRAVES, AND C. C. GIBBS, TRUSTEE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS, SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

On the 6th of May, 1896, the plaintiffs in error, by their attorneys, Messrs. Ashton and Cobbs, filed their brief consisting of sixty-one printed pages. I therefore beg to make the following reply thereto:

In order to understand the contention made it is necessary to state that the legislature of Texas in 1879 adopted a revised code, revising and embracing all the laws then in existence in that State. Article 3809 of the Code then

adopted prescribed the requisites of a survey of public land. It required, among other things, that the surveyor who makes a survey should certify officially that the survey was made according to law and that it was *actually made in the field.* The same legislature which adopted the Code passed a separate act authorizing the sale of certain public lands, including the lands in controversy, for the price of fifty (50c.) cents per acre. That act is substantially set out in the briefs of the several counsel representing the plaintiffs in error. It is contained in chapter 52 of the Acts of 1879. The second section of that act reads as follows:

"Any person, firm, or corporation desiring to purchase any of the unappropriated lands herein set apart reserved for sale may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase *to be surveyed by an authorized public surveyor of the county or district in which the land is situated.*"

The other provisions of the act provided for the making of maps and the recording of field-notes of the survey and their return to the Land Office. Plaintiffs in error made application for the purchase of the land in question and a great deal more not in controversy, but they did not cause the land or any part thereof to be surveyed, as required by section 2 of the act above quoted, nor was the survey of the same *actually made in the field, as required by article 3809, above cited.* (Record, p. 12, par. 15, Brief of Messrs. Ashton and Cobbs, on motion to dismiss, p. 8.)

As a substitute for an *actual survey in the field* the surveyor copied some field-notes made by one Elgin some ten years before for a railroad company and not for plaintiffs in error. The purchase-money was paid to the State treasurer, as indicated in other briefs filed herein, but after the then attorney general of Texas advised the parties that the State would resist their claims to the land because they had acquired no title thereto. (Rec., pp. 42 and 49.)

The State of Texas subsequently, through its duly author-

ized officer, brought this suit to recover the land in controversy. Disclaimers were filed as to the others and the case proceeded to trial without a jury. The trial court rendered a judgment for the State, based mainly on the proposition that inasmuch as no actual survey of the land in controversy had been made or caused to be made by plaintiffs in error, that therefore they acquired no right thereto. From that judgment in favor of the State plaintiffs in error appealed to the court of civil appeals, where the judgment of the lower court was affirmed. They then applied to the supreme court of Texas for writ of error. The application was by the court denied, presumably because that court agreed with the court of civil appeals on the proposition above stated. The case was then brought to this Court for review.

On the facts above stated it is submitted that this Court is without jurisdiction to hear this case, for the reason that the record presents no question arising under the Constitution and laws of the United States. It is plain that the only question is whether the State of Texas has entered into a contract to sell with appellant; in other words, whether the contract of sale was made notwithstanding the fact that plaintiffs in error did not comply with the terms and conditions offered by the State—that is to say, did not have the land *actually surveyed on the field.* If the sale was completed, the judgment of the State court was wrong; if the sale was not completed, the judgment of the State court was correct; but it is submitted that this Court is powerless to institute an inquiry as to whether the contract had been made or not. The State statutes regulating the sale of lands situated entirely within her own borders must be presumed to have been correctly construed by the State supreme court. This view is strengthened by the fact that this is a controversy between Texas and its own citizens. Counsel for plaintiffs in error are not agreed in stating Federal questions. Some of their briefs insist that the Federal question is based on two facts:

First. Because after plaintiffs applied for the land and had the field-notes copied, as above set out, the Texas legislature passed an act to withdraw all the unsold lands in the market.

Second. Because the alleged contract of sale was made with the State.

It is sufficient to say that the act withdrawing the land from sale does not purport to interfere with existing contracts nor to disturb existing rights. It should also be added that the judgment of the State court was not based on the act withdrawing the lands from market. Indeed, it is plainly apparent that that act had nothing to do with the decision of the case. The decision was made to rest on a single proposition, that no contract had been entered into, in that the plaintiffs in error had not accepted the terms offered by the State and had not complied with the conditions which the statute thus plainly prescribed. It was not insisted by the court that the terms had been complied with, but that by reason of the act subsequently passed withdrawing the lands from the market the contractual rights were destroyed or impaired. It is submitted that the rights of the parties would not be different whether that act had been passed or not. This suit was brought for the land because the plaintiffs in error had not completed their contract, and yet claimed title and possession of the lands in controversy. It was not brought because the lands had been withdrawn from the market, nor was the right to recover based upon that act. Stripped of superfluous statement, the contention of the plaintiffs in error is that the State court erred in holding that the acts above set forth did constitute a contract with the State, and that therefore they are the owners of the land, and that the State had parted with all title thereto.

The record does not disclose that the passage of the act by the legislature in any way affected the question. On the

contrary, it appears that the only complaint of the plaintiffs in error is that the *judgment of the State court* impaired the obligations of the alleged contract, in that it failed to decide that such contract existed. The case therefore falls plainly within the rule announced by this Court that unless the obligation of a contract in controversy is impaired by *law* this Court has no jurisdiction. The constitutional prohibition is aimed at the legislature and not at the courts, and, although the State courts may err in holding that given facts proven do not constitute a contract, still this Court has no jurisdiction to review the findings of the State court on questions of fact of the character disclosed by this record. (Knox *vs.* Ex. Bank, 12 Wallace, 379; N. O. Water Works *vs.* La. Sugar Company, 125 U. S., 30; Morely *vs.* Lake Shore, &c., 146 United States, 171.)

Touching the other proposition, that this Court has jurisdiction to try and determine all controversies based on contracts with the State, it is submitted that the proposition has well-defined limitations, as the authorities cited by plaintiffs in error disclose. Their authorities do not support the doctrine as broadly as announced by them. Jefferson Branch Bank *vs.* Skelly, 1 Black, 436, is the first case relied upon by them. In that case it was shown that the bank had been chartered by special act of the Ohio legislature. The 6th subdivision of the charter limited the amount of taxes that the State could levy on it to 6 per cent. of its earnings. The Ohio legislature subsequently passed an act increasing the taxation beyond the limit thus fixed in the charter. The supreme court of that State held that the charter of the bank was not a contract within the meaning of the Constitution. The power of this Court was therefore invoked to determine whether the charter was a contract, and also whether its obligations were not impaired by the subsequent legislation above mentioned. There was no question, however, in the State court about the bank's having accepted the terms of this charter. That seems to have been conceded.

The second case cited by plaintiffs in error is the case of The Mobile and Ohio Railroad *vs.* Tennessee, 153 U. S., 486. In that case it is stated that the railroad had been chartered by special act of the Tennessee legislature passed in 1848. One clause of this charter contained certain tax exemptions; but by subsequent acts of the legislature these exemptions were ignored. This Court was called upon to determine whether the last acts of the legislature imposed burdens beyond the charter limits and did not impair the obligations of the charter contract. In that case no question was made as to the acceptance of the terms of the charter, but it was tried on the assumption that the railroad company had accepted those terms and was operating thereunder.

Another case cited by plaintiffs in error is Bryan *vs.* The Board of Education, 151 U. S., 639 and 650. The opinion of the Court in that case shows that the Kentucky legislature had chartered by special act the Millersburg Institution, located at Millersburg, Kentucky, reserving therein the right to amend or repeal the charter. This institution was under the supervision and control of the annual conference of the Methodist Church. Donations were made to it as thus organized and located. Later the same legislature chartered the board of education of the Methodist Church and reserved therein the right to amend or repeal the same. The board of education was given express control of the Millersburg Institution. Subsequent to this the legislature by another act authorized the removal of the institution from Millersburg. The issue was then made whether this *last act of the legislature* did not impair the obligations of the contract made by the former laws and proceedings thereunder. No question was raised as to whether the Methodist Church or the people at Millersburg had accepted the terms of the charter. The effect of the act of the legislature upon contracts previously made was the only question involved.

Another case cited by the plaintiffs in error is Wright *vs.*

Nagel, 101 U. S., 794. The issue in that case was whether the statute of Georgia authorized the inferior court of that State to grant the exclusive right to establish and maintain toll-bridges in any given locality. There was no question, however, as to whether the contending parties had accepted the terms of the orders of the court. The only question in that case was as to whether, after having granted a privilege to establish and maintain toll-bridges, the subsequent proceedings of the law-making power or its authorized agencies had impaired the obligations of the contract first made by granting to others the same privilege, to be exercised at the same points. It will be noted, however, that in this case the act withdrawing the land from sale, as before stated, had nothing to do with this contract, nor with the decision of the court in this case. The record does not disclose that such act controlled in any degree whatever the decision of the court, nor that it could have influenced the court in reaching its conclusion. There was no legislative agency in this case whose acts impaired the obligations of the contract, because the record discloses that the statute made it the duty of the purchaser of the lands to cause the same to be surveyed; that duty was imposed by law on the *purchaser*, and the fact that he did not perform the duty which the statute had enjoined upon him was the reason why the court held there was no contract. The fault was not with the law withdrawing the land from the market, because it is not shown that that prevented them from causing the land to be surveyed; nor does it appear that they intended to survey it. It is therefore confidently submitted that the record does not disclose any question arising under the Constitution or laws of the United States, and that the motion to dismiss the writ of error should be granted.

In the event, however, the Court entertains jurisdiction of this case, we submit that the judgment of the State court is correct and should be approved. In this connection it is not necessary to restate facts; suffice it to say that, as above

stated, the law required the applicants for land in controversy to cause the same to be *actually surveyed in the field* before they could become the purchasers thereof. The record discloses that there was no actual survey on the field; there was no survey of any kind. On the contrary, the surveyor, with the full knowledge of the plaintiffs in error, proceeded to copy from some field-notes made by Mr. Elgin in 1873. Those field-notes were not authorized by law to be made at that time, because the record shows that the land in controversy at that time was reserved from sale for the purpose of aiding in the construction of the Texas and Pacific railroad. Besides that, no actual survey of all the land was made by Mr. Elgin. He testified in substance that they never run all four lines of any section, unless it was an accident. However, in some instances all four corners were established on the ground (Rec., p. 41). But he could not state whether all four corners of any of these surveys were established. That an actual survey is necessary, our supreme court has several times decided. (State *vs.* Work, 63 Texas, 148; White *vs.* Martin, 66 Texas, 340; Jumbo Cattle Co. *vs.* Bacon & Graves, 79 Texas, 5; Land Co. *vs.* Thompson, 83 Texas, 169; Sanborn *vs.* Gunter, 84 Texas, 248.)

By the Supreme Court's refusing a writ of error in this case the doctrine was again reaffirmed. This Court has also held that under the Texas statute now being considered no sale of land would be effected without a survey. (Campbell *vs.* Wade, 132 U. S., 37; Count Joseph Telfener *vs.* Russ, decided at present term, not yet reported.)

To meet this proposition counsel for plaintiffs in error insist that the State is bound by construction given to the statutes before the attempted purchase. Authorities are cited to sustain that proposition. The weak point in this position is that the statute on which the plaintiffs in error base their right has never been construed in harmony with their contention. Other statutes relating to the survey of public land, differing substantially in terms from that under

examination now, had been held not to require an actual survey of all the lines on the ground. It must follow, therefore, that if the rule invoked by them in this case is now the law of any case, it has no application to this. On the contrary, the rule announced by this Court is to the effect that the supreme court of the State in construing a new statute is not bound by its former construction on other, though similar, statutes.

Wood *vs.* Brady, 150 U. S., 22 and 23.

In that case it was substantially held that the contention of plaintiffs in error, if sustained, would prevent any correction of existing evils by the courts. It is plain that if that contention be correct that it would not signify that the new statute unequivocally demanded what the old one had only inferentially suggested; yet the courts would be compelled to follow the erroneous decisions based on the old statutes. Such a course would put it beyond the power not only of the courts, but of the legislature as well, to correct abuses in the public service, however necessary those corrections might become.

It is not necessary to suggest to this Court the necessity of making an actual survey in the sale of such large bodies of land as are involved in this controversy. It must not be forgotten that Texas is largely a prairie country. It is a matter of great moment and much public concern that the surveyors should definitely fix the boundaries of the lands sold, to the end that litigation in reference thereto may be reduced to the minimum. It also becomes important that when the State sells its lands that the boundaries should be fixed by actual survey, so that controversies between the State and the citizens in reference thereto may be avoided. These were sufficient reasons to induce the legislature to pass the more stringent acts of 1879. And whether the reasons were sufficient or insufficient, the legislature passed the law, and a purchase was attempted to be made there-

under. But it will not do to say that the purchaser can ignore the terms of the offer and yet undertake to compel the performance on the part of the State of its portion of the contract. As well stated by the court of civil appeals in delivering an opinion in this case—

"If this were a controversy between individuals where a sale of land had been attempted, the offer being made by the vendor that the purchaser should complete his purchase, he must have the land actually surveyed in the field. The purchaser would not be heard to ask a specific performance of the contract on the part of the vendor until he had performed his part of thec ontract; and if he refused to comply with the terms of the offer, it would certainly be held that he had no title to the land."

Counsel for plaintiffs in error seem to contend that because the surveyor certified he had actually surveyed the land that that should suffice. That contention cannot be maintained. Surely the State should not be bound by a false certificate of an officer, [redacted] known to be false by those who seek its benefits. Neither can any right be acquired by the payment of the money in this case. The rights of the plaintiffs in error would be as effectively fixed by making the surveys and tendering the money, even though it had been refused, as it would have been fixed by the acceptance. Besides, in this case, they were advised, as hereinbefore stated, that their claims to the land would be contested; in other words, that the State insisted that they had no rights thereto. The acceptance by the officers of the money, unless the terms and conditions of the sale had been complied with, could not bind the State. The duties of the officer [redacted] were measured and prescribed by the statutes; all those dealing with them must take notice of that fact. They cannot acquire any right against the State by procuring an officer to do an authorized act. This case might be well illustrated. Suppose that "A" would bind "B" as his agent to sell land, stipulating in his

power of attorney to "B" that no land should be sold unless the purchaser should have it surveyed and its corners marked on the ground. Of the contents of the power of attorney, the purchaser would have actual notice. It would not be then contended that "B" as the agent could collude and conspire with the purchaser, and thus compel "A" to sell his lands upon conditions to which he did not agree.

If the contention of plaintiffs in error be maintained, he could be compelled so to do. If their contention be correct, his agent and the purchaser could copy from old field-notes made without actual survey on the ground and without establishing the four lines the corners of the survey, and thus compel him to sell his lands upon conditions to which he never agreed. In that event, of what avail would be his offer and the limitations on the power of his agent?

It is respectfully submitted that the case was correctly decided by the State court, and that its decision should be in all things approved.

M. M. CRANE,
Attorney General of Texas.

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JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1895.

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In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

Brief for the Plaintiffs in Error in Reply to the Supplemental Brief for the Defendant in Error.

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Brief for the Plaintiffs in Error in Reply to the Supplemental Brief for the Defendant in Error.

I.

The judgment of the court below upon the pleadings and findings of fact in the record necessarily gave effect to the repealing act of January 22, 1883, as against the plaintiffs in error, and the rights claimed by them under the sales acts of July 14, 1879, and March 11, 1881.

It is not perceived that the brief of the learned Attorney General of Texas offers any reply to this proposition as presented in the brief of the counsel for Mr. Gibbs on the merits. (Brief, pp. 29, 30, 31, 32.)

The proposition deals with the judgment of the court below, as this Court, we understand, dealt with the judgment of the supreme court of Louisiana under review in the leading case of *Louisiana vs. Pilsbury* (105 U. S., 278), which is not noticed in the brief for the defendant in error.

In the Louisiana case it appeared that the court below in its opinion expressly declined to pass upon the validity of the premium bond act of March 6, 1876, which was impugned as impairing the obligations of contracts, and disposed of the case upon the question of the original validity of the bonds under the act of 1852; but this Court, nevertheless, took jurisdiction of the case upon the writ of error and reversed the judgment of the supreme court of the State, upon the ground, as we suppose, that that *judgment* necessarily gave effect to the subsequent act of 1876.

The opinion of the court of civil appeals, in this cause, undoubtedly avoided any direct reference to the repealing act of 1883; but when the court affirmed the judgment of the trial court, upon the pleadings, that the State recover of and from the defendants the land in controversy, the court necessarily gave effect to the act of 1883, which was impugned by the defendants as impairing the obligations of the contract with the State under which they asserted and claimed in their answer a complete equitable title to the land. (Answer of defendants, Record, pp. 4, 5, 6, 7.)

It will be observed that the answer, after setting forth the application to purchase the land, under the acts of 1879

and 1881, the survey of the same, the recording of the field-notes of the surveys in the office of the district surveyor, the return of the field-notes to the general land office of the State, and the payment of the fees required by law to be paid to the land office, avers:

"And these defendants, having in so far fully and completely complied with and performed all the requirements of the said acts to entitle them to become purchasers of said lands, thereafter, to wit, on or about the 16th day of May, 1883, and the 19th day of May, 1883, and within the time prescribed by the provisions of said acts (of 1879 and 1881), presented to the treasurer the certificate of the commissioner of the general land office exhibiting the fact that the field-notes of the lands desired to be purchased by them had been returned to and filed in said office, and that these defendants had paid all the fees and charges to the State thereon required by law, and then and there these defendants offered and tendered to said treasurer of the State the full amount of money necessary to pay the State for all of said lands, at the rate of fifty cents per acre, as the same had been surveyed and the field-notes thereof returned to the land office, into sections of 640 acres each, as provided and required by law.

"These defendants further aver that the said treasurer of the State of Texas, *disregarding the rights of defendants, so as aforesaid regularly and legally acquired to said land*, refused to receive the money so tendered in payment for said land and to give them a receipt and certificate for such payment, *so that they might thereon proceed and procure patents to be issued to them for said several sections, as they desired to have done*, and further to pay all charges and dues to the State, as they were ready, willing, and able to do." (Rec., pp. 4 and 5.)

The answer then shows that the treasurer refused to receive the purchase-money and to give receipts therefor until January 3, 1891, when the defendants paid to him $149,120 for and in purchase of 298,240 acres of land, being part of the land sued for in this action, and the treasurer

delivered to the defendants a receipt for this money, designating the sections by number for which the money was paid, and "the purchase of the said land was thereby perfected in accordance with the terms of the acts of 1879 and 1881," and that "in due course of the business of said treasurer's office separate receipts were executed and delivered by said treasurer for each and every one of the said several sections of land, and the same were at once delivered to the commissioner of the general land office and deposited in said office, in full and literal compliance with the requirements of the law." (Rec., p. 6.)

The answer further represents as follows:

"The defendants respectfully represent that they are rightfully and justly entitled to have extended to them the title to said several sections of land hereinbefore claimed by them by right of their purchase under said acts as aforesaid, by the issuance of patents therefor by the general land office, as in other cases by law is provided.

"And so defendants aver and represent, as hereinbefore alleged, the said plaintiff, The State of Texas, having received and receipted for the said sum of one hundred and forty-nine thousand one hundred and twenty dollars ($149,120) and appropriated the same to its general and specific purposes, as all other money paid into the State on the purchase of lands is appropriated, said plaintiff hath not made provision for and doth not now offer to return to said defendants the money paid as aforesaid, or any part thereof; and defendants say that the said plaintiff ought not to be permitted to proceed with the trial of this cause without the return or tender to return to defendants the money so paid out by them and received and appropriated by said plaintiff; that the said plaintiff to be permitted to deprive these defendants of the lands so purchased by them as aforesaid, and in which they have a vested right, will be in violation of the Constitution of the United States, impair and destroy the obligation of the contract, and perpetrate an irreparable wrong and injury upon defendants.

"That the defendants having in all respects fully complied with the provisions of the law in respect to the purchase of said lands under which said lands were offered for sale by the plaintiff, their rights thereto become and were vested, and the act of the legislature subsequent thereto repealing said law was, under article 2, section 10, subdivision 1 of the Constitution of the United States, null and void as affecting defendants' vested right.

"Wherefore defendants pray for judgment in their behalf that the plaintiff take nothing by its suit, and that defendants have and recover of plaintiff the lands as herein claimed by them, and for a decree, mandatory in its terms, commanding and directing the commissioner of the general land office to issue to defendants, and in their behalf, the patents for the several sections of land numbered from one (1) to one hundred and seventeen (117), both inclusive, in block B, and from one (1) to two hundred and ninety-one (291), both inclusive, in block G, and from one (1) to fifty-eight (58), both inclusive, in block M, in said Scurry and Borden counties, as the same are designated and delineated on a sketch made and returned by the surveyor of Palo Pinto land district, accompanying his return of the field-notes of said surveys to the general land office.

"And defendants further pray that if the judgment and decree of your honor's court shall not be effective to secure obedience thereto, in the issuance of patents to defendants, evidencing the conveyance of the title to the land as herein claimed, because of its being directed to the commissioner of the general land office, being the head of one of the executive departments of the State government, then defendants pray that the decree of your honor's court be so made and framed as that the same shall declare and adjudge the title to the lands to be vested in the defendants, and shall operate and serve them as a muniment and title thereto."

The State of Texas replied to the case of the defendants in respect to their title to the lands as made in their answer, by its *supplemental petition*, in which it averred that "the defendants were not *entitled or authorized to purchase the said lands*, and did not comply with the law in reference

thereto in any particular, and did not, in fact, purchase the same from plaintiff through any officer authorized to bind or conclude the plaintiff, and SAID LANDS WERE NOT AT THE TIMES NAMED ON THE MARKET FOR SALE, and that if said defendants did, in fact, tender the treasurer the sum of money named in 1883, as alleged, the treasurer properly refused and declined to receive the same, for that the defendants had not purchased the same from plaintiff by complying with ANY EXISTING LAW AUTHORIZING THE PURCHASE AND SALE THEREOF," &c. (Rec., p. 8.)

It is thus specifically claimed by the State of Texas in this its pleading in the suit that the defendants were not *entitled or authorized to purchase the lands;* that at the times the defendants did the acts set forth in their answer for the purpose of perfecting their purchase of the lands, under the sales acts, the lands were not *on the market for sale;* and that when the defendants tendered the purchase-money, in May, 1883, the treasurer properly refused to receive it because the defendants had not purchased the lands from the State by complying fully with any *existing law authorizing their sale and purchase.*

The State must be understood to mean by this, that the lands having been *withdrawn* from the market and from sale by the repealing act of 1883, the defendants were not entitled or authorized to purchase them, and they could not, by the acts done and performed by them, at the times named in their answer, after the passage of the repealing act, perfect the purchase of and acquire the title to the lands against the State.

It is thus clear that the right asserted by the State to recover the lands, as against the title to them claimed by the defendants, under the alleged contract with the State, was based and intended to be based, in this supplemental petition, upon the repealing act of 1883.

It cannot be said, therefore, as submitted by the learned Attorney General, that the rights of the parties, as viewed and determined by the judgments of the State courts, "would not be different whether that act had been passed or not."

The judgments of the State courts, by which the State recovered the lands, necessarily gave effect to the repealing act in favor of the State, and against the contract rights asserted by the defendants in respect to the lands which they claimed to have purchased by full compliance with the terms of the sales acts of 1879 and 1881.

This Court, in *Louisville & Nashville Railroad vs. Palmes* (109 U. S., 244, 256), said:

"The question we have to consider and decide is whether, in the *judgment* under review, the supreme court of Florida gave effect to a law of the State which, in violation of the Constitution of the United States, impairs the obligation of a contract.

"In reaching a conclusion on that point, we decide for ourselves, independently of the decision of the State court, whether there is a contract and whether its obligation has been impaired, and if the decision of the question as to the existence of the alleged contract requires a construction of State constitution and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except when they have been so firmly established as to constitute a rule of property. Such has been the uniform and well-settled doctrine of this Court."

In *Charles River Bridge vs. Warren Bridge* (11 Peters, 420) it was said:

"But if that court [Massachusetts] had deliberately and unanimously decided that the plaintiff's property had *not* been appropriated to public use under the constitution of Massachusetts, still, when the same point becomes important as a question of jurisdiction before this Court, they must decide for themselves. The jurisdiction of this Court could in no respect be considered as a consequence of the decision of the above question by the State court, in whatever way the decree might have been rendered."

II.

The law of surveys in Texas before the Revised Statutes of 1879.

The learned Attorney General does not question, as we understand his argument, the correctness of the statement, in the briefs for the plaintiffs in error, that under the statutory requirement as to surveying public lands in Texas the supreme court of that State, from the foundation of the government, for more than half a century, uniformly held it competent, legal, and valid to survey land, as these lands were surveyed for Bacon and Graves, under their application to purchase them, and that all the departments of the State government consistently acted upon that view of the law, up to the decision in the present case.

The Attorney General submits, however, that "the statute on which the plaintiffs in error base their right," meaning, as we suppose, the sales act of 1879, "has never been construed in harmony with their contention," adding that *other statutes relating to the survey of public land, differing substantially in terms from that under examination now, had been held not to*

require an actual survey of all the lines on the ground." (Supplemental Brief for the Defendant in Error, pp. 8, 9.)

The "other statutes relating to the survey of public land," intended to be referred to in that brief, are not mentioned, so that we cannot tell whether or not they differ substantially in terms from the act of 1879, but it is admitted by the learned counsel, that such statutes, whatever they were, "*had been held not to require an actual survey of all the lines on the ground.*"

This reference no doubt is to the authorities cited on pages 38 to 43 of the brief for Mr. Gibbs, and on page 8 of the brief for Messrs. Bacon and Graves.

The Attorney General, indeed, does not appear to dissent from the view of the counsel for the plaintiffs in error in regard to the effect of the decisions of the supreme court of Texas cited in the briefs. If his view of the effect of those decisions differed materially from that submitted to the learned Court by the counsel for the plaintiffs in error, the Attorney General undoubtedly would have so stated in his brief, prepared or printed after the oral argument of the cause.

One of the latest cases, in the list of authorities, is *Duren vs. Railway* (86 Texas, 291), decided in 1883, where the supreme court said:

"It seems that the survey and field-notes were made by an agent of the locators, and were *approved and adopted by the lawful surveyor.* This is certainly a practice not to be commended and one which it would seem the legislature did not contemplate. Therefore, if the question were an open one, we might have difficulty in reaching the conclusion that a survey made by a locator for his own benefit could be *adopted* by the surveyor so as to give it any validity. But it was held in Howard *vs.* Perry, *supra,* that this could be done. It is true that in that case the locator was himself the deputy surveyor, but the court seem to at-

tach no importance to that fact. In the opinion they say: 'But it is objected to the defendant's survey that it was made by and for himself. It is, however, approved by the district surveyor, and thereby became in contemplation of law his act.' And we apprehend that the deputy had no authority to make a survey for himself, and that validity of the survey depended wholly upon the approval of the district surveyor. Such is our construction of the opinion, and it is decisive of the point before us. *Whatever our own views may be upon the question as an original one, it has been too long recognized as a rule of property in every department of the State government to be now overturned.*"

III.

The provisions of section 2 of the sales act of July 14, 1879.

The position of the Attorney General, in this case, appears to be that the *second section of this act of 1879* "required the applicants for the land in controversy to cause the same to be *actually surveyed on the field* before they could become the purchasers thereof;" and it is added, "the record discloses that there was no actual survey on the field; there was no survey of any kind. On the contrary, the surveyor, with the full knowledge of the plaintiffs in error, proceeded to copy from some field-notes made by Mr. Elgin in 1873," &c. (Supplemental Brief for the Defendant in Error, p. 8.)

It is then stated in the brief:

"That an actual survey is necessary our supreme court has several times decided." (State *vs.* Work, 63 Texas, 148; White *vs.* Martin, 66 Texas, 340; Jumbo Cattle Co. *vs.* Bacon & Graves, 79 Texas, 5; Land Co. *vs.* Thompson, 83 Texas, 169; Sanborn *vs.* Gunter, 84 Texas, 273.)

The positions thus assumed by the learned counsel for the defendant in error cannot be maintained.

(*a.*) In the first place, the sales act of 1879 pointed out *no mode* at all in which surveys under the act should be made; on the contrary, it reposed a *discretion* on the subject in the commissioner of the general land office, who could, by his instructions to surveyors, have reasonably liberalized the manner of making surveys for the purposes of the act, and unquestionably he could have expressly authorized the adoption of surveys.

The second section of the act of 1879 provided:

"Any person, firm, or corporation desiring to purchase any of the unappropriated lands herein set apart and reserved for sale may do so by causing the tract or tracts which such person, firm, or corporation desire to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated."

And section 7 of the act provided:

"It shall be the *duty* of the commissioner of the general land office to give such *general and specific instructions to surveyors in relation to the surveying of the public lands under the provisions of this act as may best subserve the interests of the State and carry into force and effect the intent and purposes of this act.*"

It is thus clear that the second section of the act of 1879 pointed out *no mode* in which the surveys should be made. The section certainly did not expressly require a proposed purchaser to cause the lands applied for "to be *actually surveyed on the field* before he could become a purchaser," in the sense of the present contention of the State. There is nothing in the law to that effect.

As we have said, the act left a discretion on the whole subject with the commissioner of the general land office, and he could have authorized the adoption of surveys.

If the commissioner *failed* to give instructions to surveyors as to how surveys should be made, a surveyor was necessarily governed by the general law as expounded by the supreme court of the State in the cases cited, which had established beyond question the right of one surveyor to adopt the work of another surveyor in the field which he believed to be correct.

Clearly, it was not the intent or purpose of the act of 1879, by which the State offered her public lands for sale, under applications and surveys, to surround such surveys with peculiar restrictions, conditions, or technicalities, and plainly the act contemplated that the surveys under it were to be made as the law required other surveys to be made, and that surveys valid as between citizen and citizen should be valid as between a citizen and the State.

The great object of the act was to raise money quickly, and to further this object there was no limit as to acreage which any purchaser, whether a corporation or an individual, might buy under the offer of the State.

The act shows on its face the intention of the legislature, for its own purposes, to deal liberally with proposed purchasers of the State's lands, and all its provisions must be read by a court in the light of that intention and so as to carry out the general design of the law. Such is the legal rule for the construction of the statute.

(*b.*) It follows that the surveys in controversy as made for Bacon and Graves were legal surveys under the act of 1879.

There is nothing in that act which affects them with invalidity.

The Attorney General states that the surveyor, "*with the full knowledge of the plaintiffs in error*," copied from the field-notes of the Elgin surveys in 1873 (Brief, p. 8).

The court of civil appeals in its *opinion* states as follows:

"Bacon and Graves, *at the time they returned the field-notes* [to the general land office], *knew how the surveyor obtained them, and that none of the work had been done in the field.*" (Rec., p. 139.)

The field-notes were returned to the land office on the 17th and 20th of March, 1883. (Findings 4, 5, 6, 7, 8, and 9, Rec., p. 11.)

There is no finding or statement of the court in this case that Bacon and Graves had any knowledge of the fact referred to *before or until the 17th and 20th of March, 1883*, when, of course, it was *too late to have new surveys made in the field, the law under which the land was offered for sale having been repealed.*

The statement in the opinion of the court below is confined, however, to Messrs. Bacon and Graves.

It is not stated in the opinion or anywhere in the record that *Mr. C. C. Gibbs*, one of the plaintiffs in error, to whom a portion of the lands included in the suit were conveyed on May 26, 1890, knew at that time or before that time, how the surveys were made, and that none of the work had been done in the field. (Finding 14, Rec., p. 12.)

(*c.*) The Attorney General further states, in the portion of his argument we have been considering, "that an actual survey is necessary our supreme court has several times decided," and for this five cases are cited. (Brief, p. 8.)

We have examined the cases, but are unable to find that they decide any question as to *adopting surveys*, or that any point as to the right of one surveyor to adopt the work of another surveyor, believed by him to be correct, was involved in them or any of them.

State vs. Work, 63 Texas, 148:

This was an *application* to purchase certain land under the act of 1879. Before anything else was done, the repealing act of 1883 took effect, and the court held that the applicant had acquired no right in respect to the land.

The party having done nothing but file his application with the surveyor, no question as to the validity of any survey could be presented.

White vs. Martin, 66 Texas, 340:

This case is cited by the plaintiffs in error.

It does not appear, as we understand, that any question as to the character and validity of the survey as made on December 21, 1882, was raised in the case. The field-notes were returned to the general land office on January 30, 1883, and on March 27 following the appellee paid to the treasurer the price of the land.

The court said:

"The survey was made for the appellee within the time prescribed, and thus was vested his right."

Jumbo Cattle Co. vs. Bacon and Graves, 79 Texas, 5:

The facts of this case are stated in the brief for Mr. Gibbs on the merits (p. 35).

The court did not pass upon the validity of the survey or

upon any question of adopting surveys. There was an agreement that on January 19 and 20, 1883, the surveyor surveyed the lands into tracts of 640 acres each.

Land Co. vs. Thompson, 83 Texas, 169:

The question in this case was solely as to certain surveys beginning at a known point and platted in a block without actual survey upon the ground, and no question of *adopting a prior survey* made on the ground was raised or considered, as no prior survey had been made.

Sanborn vs. Gunter, 84 Texas, 273:

This is the last of the five cases cited by the counsel for the defendant in error. No question of the right of one surveyor to adopt the work of another surveyor was involved in this case, nor was any such question discussed or even incidentally considered in the case.

No previous survey had been made, and the court, Henry, J., said:

"In this case not only was no actual survey of the land pretended to be made, but no description of it, accurate or otherwise, was ever acquired in any way. Instead of a survey, an excuse why none was ever made is offered."

And the excuse was that danger from hostile Indians prevented any survey.

Stayton, Ch. J., in that case said:

"I do not understand the holding to be that the field-notes returned into the general land office were void because not based on an actual survey of each of the four lines of every section embraced in the block. If such were the holding, it would be useless to refer to decisions made under laws in force prior to the adoption of the Revised Statutes for the purpose of showing that the rulings of this court have in all

preceding cases been to the contrary. These decisions are well known to the profession, and to establish a different rule now would be attended with consequences so disastrous to the public welfare, peace of society, and private rights that no court would be authorized to do so, even if such a rule might have been more in harmony with the statute."

IV.

Article 3908 of the Revised Statutes of Texas.

The argument submitted in the brief of the Attorney General ventures upon no reply to the careful argument presented by the counsel for the plaintiffs in error, showing that it cannot be deemed to have been the intention of the legislature in enacting this article 3908 to overthrow the then settled law of the State which authorized surveys to be made in the mode and manner the surveys here in question were made for Bacon and Graves—that is to say, by the adoption of a prior and legally sufficient original survey in the field.

Indeed, the argument for the State against these surveys seems to rely more upon the supposed effect of the second section of the sales act of 1879 than upon the provisions of article 3908 of the Revised Statutes, which were the mainstay of the court below. The argument for the State appears simply to assume that *subdivision 8* of that article, which prescribes the contents of the *certificate* of the surveyor, is legally conclusive evidence of an intention on the part of the legislature to change the then existing law of the State by requiring that every survey shall in fact be an original survey, actually made in the field.

But the article cannot be construed in that way consistently with the established rule of law in this country for the interpretation of such an enactment, by which mere variations in the language of a revision from the language of former statutes relating to the same subject, under which the law had become settled by judicial decisions, cannot be regarded as intended to call for a different construction or effect. (See, in addition to the authorities cited in the former brief, Burnham *vs.* Stevens, 33 N. H., 247; Ash *vs.* Ash, 9 Ohio St., 383; Allen *vs.* Ramsey, 6 Metc., 635; Dominick *vs.* Mitchell, 4 Sandf., 374; Goodell *vs.* Jackson, 20 Johns., 722; *In re* Brown, 21 Wend., 316.)

The intention of the legislature, in this case, is to be ascertained, not from the particular *phraseology* of subdivision 8 of the article 3908, but from all the facts in regard to the framing of the revision, showing what changes in the existing law were contemplated by the codifiers, and from the circumstances attending the passage of the act, as well as from the language of all the pertinent provisions of the article.

These show that the legislature in enacting article 3908 did not intend to make a new law of survey, but designed to leave the law of survey substantially as it was before that revision and digest of it.

The basis of article 3908 of the Revision, as shown, was the law of Coahuila and Texas in respect to surveying lands, which is in terms even more stringent than the provisions of that article.

V.

The State of Texas cannot have and recover the land in controversy before and without repaying to the plaintiffs in error the $149,120 received from them for the land.

The counsel for Mr. C. C. Gibbs, one of the plaintiffs in error, in their argument in opposition to the motion of the State to dismiss this writ of error, submitted to the court that the State could not, in any view of the case, recover this land before and without restoring and returning to the plaintiffs in error the money which it received from them as the purchase-money for the property. (Brief on the motion to dismiss the writ of error, p. 34.)

It is to be observed that there is no finding that the treasurer of the State refused to receive the purchase-money upon the original tender, on May 16 and May 19, 1883, on the ground that the surveys returned into the general land office were invalid or insufficient and there was no contract between the State and the parties. The finding is that "said tenders were refused and declined by the treasurer." (Rec., p. 14.)

The testimony of Mr. Wortham shows that the treasurer assigned as the reason and the sole reason for declining to receive the money that a part of the surveys covered sections designated as public free-school lands. (Rec., pp. 48, 59–62.)

When the money was received, in January, 1891, it was received and receipted for by the treasurer specifically in payment for particular sections of the lands by survey number and block, under "*An act to provide for the sale of a*

portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale." (Testimony of Mr. Wortham, Rec., pp. 59, 60.)

Mr. Wortham states:

"The money was deposited to the funds as is provided by law, mingled with the other moneys of the State, and paid out in accordance with law on the comptroller's warrants and orders of transfer."

Mr. Lubbock states:

"The amount paid was $149,120, and was paid on lands as indicated in the receipts issued and delivered, and by the records of the State treasurer's office one-half the money was deposited to the credit of the public fund, the other half to the payment of the bonded debt." (Rec., p. 63.)

Upon the facts of the case, this action by the State was and is in effect an action to rescind a contract between the parties to it, as submitted in the brief on the motion to dismiss, and may be held to be governed by the principle that a party seeking to rescind must, as a prerequisite to recovery, put the party from whom the relief is claimed as far as possible in the position he was in before the transaction complained of. The plaintiff must restore whatever he has obtained that he can restore and surrender any advantage he may have received. (Wharton, Law of Contracts, § 285.)

Agreeably to this principle, it is submitted that the State of Texas cannot have the lands in controversy before and without repaying the money received for them from these parties, and that any judgment in favor of the State in the action should require the payment of such money by the State to the defendants as a condition of the recovery of the property.

It is maintained in the brief for the State that no right could be or was acquired by the payment of the money in this case.

The learned Attorney General, however, stated to the court upon the argument that the State would repay the money to the plaintiffs in error, thus recognizing the justice and propriety of such payment and the right of the plaintiffs in error to receive it from the State.

The counsel for the plaintiffs in error entertain no doubt of the disposition of the Attorney General in respect to the repayment of the money by the State, but it would not be in his power to determine or control the State's action in the event of a decision by this Court in favor of the State. and the only practical mode of securing this payment, if in any view of the case it should be held that the State may recover the lands, would be by interposing a requirement of the payment of the money to the plaintiffs in error by the State, as a condition of the relief sought by it, in any judgment that may be rendered in favor of the State in this action.

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ADDENDUM.

The case of *Fisk vs. Jefferson Police Jury* (106 U. S., 131, 133, 135) should have been cited under the *first point* in this brief, on the question of *jurisdiction*, in connection with the case of *Louisiana vs. Pilsbury*. It was a writ of error to the supreme court of Louisiana. This Court adjudged that the prohibition of the Constitution against State laws impairing the obligation of contracts applies to *implied* as well as to express contracts, and that a change in a State constitution which takes away the then existing powers of taxation, so as to deprive an officer of the means of collecting his compensation, is within that prohibition.

By the constitution of Louisiana of 1880 it was declared that no parish or municipal tax for all purposes whatsoever should exceed ten mills on the dollar of valuation.

Mr. Justice Miller, speaking for the Court, said :

"In answer to the argument, as applied to plaintiff's case, that the constitutional provision impaired the obligation of his *contract*, the Supreme Court decided that his employment as attorney for the parish *did not constitute a contract*, either in reference to his regular salary or to his compensation by fees; *and this question is the only one discussed in the opinion, and on that ground the decision rested.* * * *

"The provision of the constitution restricting the limit of taxation, so far as it was in conflict with the act of 1871, and as applied to the contract of plaintiff, impaired its obligation by destroying the remedy *pro tanto*.

"It is apparent that if the officer whose duty it is to assess the taxes of this parish were to perform his duty as it is

governed by the law of 1871, the plaintiff would get his money; *but the constitutional provision has repealed that law and stands in the way of enforcing the obligation of plaintiff's contract as that obligation stood at the time the contract was made.* * * * We are of opinion, therefore, that, as regards plaintiff's case, *this restrictive provision of the constitution of* 1880 *does impair the obligation of a contract.*"

The case seems to be decisive of the question of jurisdiction in the present case.